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IN THE

# Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*
*Petitioners*,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
*Respondents*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI WORLDCOM NETWORK SERVICES, INC.,
*Respondents*.

**Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR WRITS OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where a state intends to preserve its immunity from private party suit under the Eleventh Amendment, can waiver be assumed under federal law when a state commission continues to regulate local telecommunications services and requires its jurisdictional public utilities to comply with the new duties and obligations created by the Federal Telecommunications Act of 1996?

2. Where a state commission is entitled to immunity from private party suit in federal court, can a party aggrieved by an order of the commission obtain federal court review of the order by bringing suit against the individual members of the commission in either their official or individual capacities?

3. Should federal courts apply a *de novo* or deferential standard of review to a state commission's legal interpretations of the Federal Telecommunications Act of 1996 contained in an arbitration and interconnection agreement?

## PARTIES TO THE PROCEEDINGS

Pursuant to Rule 12.4, two proceedings are at issue.

In the proceeding arising from Third Circuit Docket No. 00-2257, petitioners are Pennsylvania Public Utility Commission; John M. Quain, Robert K. Bloom, John Hanger, David W. Rolka, and Nora Mead Brownell, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission. Respondents are MCI Telecommunication Corporation, MCIMetro Access Transmission Services, Inc., AT&T Communications of Pennsylvania, Inc., Bell Atlantic-Pennsylvania, Inc. (n/k/a Verizon Pennsylvania, Inc.), and United States of America.

In the proceeding arising from Third Circuit Docket No. 00-2620, petitioners are Pennsylvania Public Utility Commission; John M. Quain, Robert K. Bloom, Nora Mead Brownell, and Aaron Wilson, Jr., in their individual and official capacities as Commissioners of the Pennsylvania Public Utility Commission. Respondents are MCI WorldCom Network Services, Inc., MCIMetro Access Transmission Services, LLC, AT&T Communications of Pennsylvania, Inc., TCG Pittsburgh, TCG Delaware Valley, , Bell Atlantic-Pennsylvania, Inc. (n/k/a Verizon Pennsylvania, Inc.), United States of America, Sprint Communications Company, L.P., The United Telephone Company of Pennsylvania, Senator Vincent J. Fumo, Senator Roger A. Madigan, and Senator Mary Jo White.

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**Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITION FOR WRITS OF CERTIORARI

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## CITATION TO ORDERS

The orders challenged were issued by the United States Court of Appeals for the Third Circuit and are reported at (1) *MCI Telecom. Corp. v. Verizon Pa., Inc.*, 271 F.3d 491 (3d Cir. 2001), *reh'g denied, mandate stayed*, and (2) *Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 273 F.3d 337 (3d Cir. 2001), *petition for reh'g denied.*

## JURISDICTIONAL STATEMENT

The judgments of the United States Court of Appeals for the Third Circuit were entered on November 2, 2001. The Third Circuit denied rehearing at Docket No. 00-2257 on January 4, 2002, but granted a stay of mandate pending this petition for certiorari. The Third Circuit denied rehearing at Docket No. 00-2620 on January 15, 2002. Pursuant to Supreme Court Rule 12.4, this petition seeks review of both judgments. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are reproduced in Appendix 72a to 75a.

## STATEMENT

*Introduction*

The Pennsylvania Public Utility Commission (PUC) is the administrative agency of the Commonwealth of Pennsylvania that is responsible for regulating the rates and services provided by jurisdictional public utilities, including telecommunications carriers, pursuant to the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 101-3316. It is a "State commission" as that term is defined by section 153(41) of the Federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* (Act or federal Act).[1] In the exercise of its state administrative powers, the PUC requires intrastate telecommunications carriers certified to provide public utility service in Pennsylvania to obey the requirements of state and federal law, including the new duties and obligations imposed by the

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[1] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§151 *et seq.*

federal Act. One undertaking of the PUC is the review and approval of interconnection agreements between carriers pursuant to section 252(e)(1) of the Act.

In two particular cases, carriers who felt aggrieved by a PUC determination approving an interconnection agreement filed a complaint against the PUC and its commissioners in federal district court pursuant to section 252(e)(6) of the Act (providing federal district court review of state commission interconnection agreement determinations) and 28 U.S.C. § 1331 (providing general federal question jurisdiction). The two complaints are in the nature of an appeal. The PUC, an undisputed arm of the Commonwealth of Pennsylvania, and its commissioners raised the affirmative defense of sovereign immunity. Immunity was denied on waiver and *Ex parte Young* grounds. The United States Court of Appeals for the Third Circuit affirmed the denial of immunity. This petition followed.

*Statutory Background: Pennsylvania Law Prior to 1996*

Competitive local telephone or telecommunications markets were introduced to Pennsylvania in 1993 by passage of "Chapter 30" of the Public Utility Code. 66 Pa.C.S. §§ 3001-3009.[2] Chapter 30 encourages accelerated deployment of affordable, universally available, state-of-the-art broadband communications network in Pennsylvania. *Popowsky v. Pennsylvania P.U.C.*, 550 Pa. 449, 706 A.2d 1197, 1199 (1997). It calls for and encourages a diversity of supply and the development of competition in local telecommunications markets. 66 Pa.C.S. § 3001 (4), (7), and (8).

Upon passage of Chapter 30, pursuant to 66 Pa.C.S. §3009(a), the PUC issued certificates of public convenience to competitive telecommunications providers thereby allowing them to compete with the incumbent Bell Atlantic-

[2] Since then, the General Assembly has expanded competition to the fields of electricity and natural gas.

Pennsylvania, Inc. The competitive carriers included MFS Intelenet of Pennsylvania, Inc., MCI Metro Access Transmission Services, Inc., TCG Pittsburgh, and Eastern Telelogic Corp.

*Federal Telecommunications Act of 1996 Complements Pennsylvania Law*

In 1996, Congress altered the regulatory scheme for local telephone service on a national level. The Telecommunications Act of 1996 requires that local service be opened to competition according to standards established by federal law. Under the federal Act, the incumbent local telephone service carriers must negotiate or arbitrate agreements with competitive local carriers, allowing entering carriers either to connect their equipment to the existing network or to purchase or lease elements and services of the existing network. The terms, rates, and conditions of such arrangements are set forth in interconnection agreements established between the carriers. The state utility commissions are asked to review and give final approval to interconnection agreements to ensure that they comport with federal law. 47 U.S.C. § 252(e)(1).

The Congressional goals advanced by the Act are consistent with the General Assembly's goals advanced by Chapter 30. *Bell Atlantic-Pa., Inc. v. Pennsylvania P.U.C.*, 763 A.2d 440, 453 (Pa. Cmwlth. 2000)(*en banc*), *alloc. granted on different grounds*. In Pennsylvania, every action required of a State commission by the federal Act can be matched to a pre-existing right or duty under state law. The terminology may differ, but the power is comparable. Thus, the PUC implemented the Act in Pennsylvania and continues to require certificated carriers to obey all lawful state and federal requirements.

The relationship between Chapter 30 and the federal Act was misapprehended by the Third Circuit. Due to an overly

broad reading of *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 370 (1999) (Iowa Utils. I), the Third Circuit opined that local telephone service in Pennsylvania operated as a monopoly prior to 1996. But, as explained, the fact is that Chapter 30 (not federal law) ended the monopoly regime in Pennsylvania. The court's error is significant to its waiver analysis to the extent that it relies upon preemption.

*Middle District Case: Review of "MFS III" Determination*

In 1995, MCI Metro Access Transmission Services, Inc. and other competitive carriers asked the PUC to adjudicate disputed issues concerning access to the network of Bell Atlantic-Pennsylvania, Inc. (n/k/a Verizon Pennsylvania, Inc.) and the rates for such access. During the pendancy of this proceeding originated under Chapter 30, the Telecommunications Act of 1996 became law. In response to this change of law, the scope of the proceeding was adapted to include application of both the existing state and the new federal law requirements.

Verizon also entered into negotiations with MCI (n/k/a WorldCom), a competing carrier which sought to provide local telephone service. After various negotiations and proceedings by the PUC, the parties established an interconnection agreement and submitted it to the PUC which approved it contingent on certain revisions and the incorporation of certain rates. These revisions and rates were established by the so-called "MFS III" proceeding, signifying phase III of the proceeding. Phase I ("MFS I") related exclusively to Chapter 30 while Phase II ("MFS II") involved a transition from purely Chapter 30 to inclusion of the rights and obligations imposed by the new federal Act.

Upon conclusion of the proceedings, WorldCom challenged the lawfulness of the approved interconnection agreement by initiating a suit in the United States District Court for the Middle District of Pennsylvania against

Verizon, the PUC, and the PUC Commissioners in their official capacities (see caption, App. 1a), pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Verizon counter-claimed and cross-claimed to challenge other aspects of the agreement. The PUC and PUC Commissioners moved to dismiss the action, arguing that they were immune from suit under the Eleventh Amendment of the United States Constitution. The District Court rejected the immunity clajm and the PUC did not appeal at that time. The District Court then resolved all the substantive claims asserted by WorldCom and Verizon, including a question about directory publishing services. The PUC and Verizon each appealed and the appeals were consolidated in the United States Court of Appeals for the Third Circuit. The Third Circuit had jurisdiction over the final decision of a District Court, pursuant to 28 U.S.C. § 1291. Its decision is reported at 271 F.3d 491 (App. 1a).

*Eastern District Case: Review of "Global Order" Determination*

In 1999, competing petitions were filed with the PUC by two groups of carriers, one consisting of Verizon and other companies, the other consisting of AT&T, WorldCom, several State Senators, and others who had opposed Verizon in various PUC proceedings. Among other things, a review of the pricing determinations made in the MFS III proceeding was requested.

In September 1999, the PUC issued a Global Order, resolving a multitude of issues before it and ordering that the decisions be incorporated into interconnection agreements. Generally, the pricing established in MFS III was modified resulting in lower rates for competitive carriers. Verizon thought the new rates were too high; competitors thought the new rates were too low. Appeals followed.

One appeal was the traditional state law appeal of a PUC order taken in the Commonwealth Court of Pennsylvania

against the PUC. Verizon petitioned the Commonwealth Court to review the Global Order for compliance with state and federal law. Cross-petitions were filed by WorldCom, AT&T and others. After briefing and oral argument, the Global Order was affirmed in all respects. *Bell Atlantic-Pa., Inc. v. Pennsylvania P.U.C.*, 763 A.2d 440 (Pa. Cmwlth. 2000) (*en banc*), *alloc. granted.*

A second appeal was filed on the same day as the first appeal. Verizon filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the PUC as well as the members of the commission in their individual and official capacities (including sitting members of the majority and the one commissioner who dissented). (Caption, App. 5a). After more than three months elapsed, WorldCom and AT&T filed cross-claims and counterclaims against the PUC and all the sitting commissioners. The United States intervened as plaintiff to defend the constitutionality of § 252(e). The PUC, several PUC Commissioners, and the State Senators moved to dismiss all the claims on the ground that the PUC and commissioners were immune from private party suit in federal court. The PUC also moved to dismiss WorldCom's and AT&T's claims as untimely and, alternatively, argued the federal court should abstain from hearing the case, pursuant to a variety of federal abstention doctrines, in light of the then-pending state court proceeding.[3] The District Court denied the motions to dismiss in a decision reported at 107 F.Supp.2d 653. The PUC and Senators each appealed and the appeals were consolidated in the Third Circuit. The Third Circuit had jurisdiction over the final decision of a District Court,

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[3] On October 25, 2000, subsequent to the District Court denial of the PUC's motion to dismiss, but before disposition of the PUC's federal appeal, the Commonwealth Court entered judgment in the state court appeal.

pursuant to 28 U.S.C. § 1291. The Third Circuit decision is reported at 273 F.3d 337 (App. 5a), as a companion decision to 271 F.3d 491.

*Third Circuit's Analysis of PUC's Immunity Claims*

The Third Circuit decided that the PUC and the Commissioners are not entitled to Eleventh Amendment immunity from suit in federal court under the Act. The court rejected the PUC's position that implementation of the Act is an act of fealty to the PUC's duties under the Public Utility Code and a recognition of the supremacy of federal law, but not more. Instead, the Third Circuit held that implementation constitutes a voluntary acceptance of a conditional gift from Congress, that "gift" being the ability to regulate local telecommunications competition and a "condition" being waiver of immunity. In a concurring opinion, Judge Ambro agreed with the majority's conclusion that the Commonwealth has waived its sovereign immunity by regulating, but he noted the apparent shift to expand the scope of the "gratuity waiver" exception discussed in *College Savings Bank*. "Rather than requiring a 'clear declaration by the State,' *College Sav. Bank*, 527 U.S. at 680, we now require a clear declaration from Congress that, by accepting the gratuity, the states will forfeit whatever rights Congress chooses to attach as a condition." 271 F.3d at 524 (Ambro, J. Concurring) (App. 50a). He further noted, the "'gratuity waiver' of the Commonwealth that we approve today lacks on its face any indicia of being intentional. The Pennsylvania Utility Commission has steadfastly maintained that it did not intend to waive its immunity from suit and that its arbitration and approval of the interconnection agreement was an action taken pursuant to state law, not the 1996 Act." *Id.* at 525 (App. 51a). Nevertheless, an acceptance of the purported conditions was found due to "the failure to refuse the grant of an authority previously possessed." *Id.* at 526 (App. 52a).

*Third Circuit's Analysis of Commissioners' Immunity Claims*

The individual commissioners' claims of immunity were rejected under the doctrine of *Ex parte Young*. The *Young* doctrine was applied as an alternative theory to acquire jurisdiction over the challenged PUC determinations. The actions against the individual PUC Commissioners are said not to be barred by the Eleventh Amendment because if the terms of the approved interconnection agreements[4] violate the Act, as alleged in the underlying complaints, that violation constitutes an ongoing violation of federal law. An injunction prohibiting enforcement of the agreements and requiring the PUC to establish different, more appropriate rates, terms, and conditions is said to be "the paradigmatic *Young* framework." 271 F.3d at 514 (App. 32a). The court concluded that neither of the two recognized exceptions to Young bars the instant action. First, the "special sovereignty interests" exception in *Coeur d'Alene* was not applied on the ground that "[a]ny sovereign interest that the Commonwealth might have in regulating local telephone competition exists solely by virtue of the role that Congress bestowed upon the states in § 252(e); the state interest in regulating in this area no longer derives from its general sovereign powers." *Id.* at 515 (App. 32a-33a). Second, the *Seminole Tribe* exception for a detailed and limited remedial scheme was held inapplicable because section 252(e)(6) "places no restrictions on the scope of the court's review or on the remedies it may impose." *Id.* (App. 33a).

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[4] In the Eastern District case, there was no approval of a specific interconnection agreement, rather, approval was given to certain generic rates, terms and conditions that were ordered to be incorporated into interconnection agreements.

*Third Circuit's Analysis of the Standard of Review*

Another question arising from the Middle District action was whether it was lawful for the PUC to Verizon to sell directory publishing services at wholesale rates as a telecommunications service.[5] Verizon argued that directory publishing services were not telecommunications services under the Act. The Middle District Magistrate Judge agreed with the PUC's interpretation of the Act and rejected Verizon's argument, but the District Court struck down this provision of the agreement. On appeal, the Third Circuit applied a *de novo* standard of review (instead of the deferential standard argued by the PUC) and affirmed the District Court. The Third Circuit reasoned that even though the PUC was acting on behalf of Congress, the PUC was not a federal agency, and therefore, the PUC's interpretation of the Act was not entitled to deference in federal courts.

## REASONS TO GRANT THE WRITS

This Petition presents substantial questions of national scope for this Honorable Court's consideration. The Third Circuit has recognized the special importance of the questions presented. See Order granting Stay of Mandate (App. 69a).

The Court should grant this petition for writs of certiorari to preserve the integrity of the Court's rulings in *College Savings Bank* and *Seminole Tribe*. Despite a clear expression of Pennsylvania's intent not to waive immunity, the Third Circuit has held that Petitioners are subject to federal court jurisdiction on a private party suit brought under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. If the Third Circuit's decisions are allowed to stand, Congress will have free reign to

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[5] Directory publishing services include basic listings with customer telephone numbers, as well as additional services such as vanity numbers, bold and foreign listings in the White Pages, and non-listing and non-publication of customers' telephone numbers.

abrogate state sovereign immunity at will. Such a result would be contrary to the anti-constructive waiver holding of *College Savings Bank* and the anti-abrogation holding of *Seminole Tribe*. Thus, the Third Circuit's decisions must be reversed.

The Court should also grant this petition to decide the proper scope of the *Ex parte Young* doctrine. While the doctrine has a place in our national jurisprudence, the Third Circuit applied it so indiscriminately that its application nullifies Eleventh Amendment protections. The form of the underlying pleadings has been elevated over the substance contrary to the holding of *Pennhurst II*, which bars suits against state officials when the state is the real party in interest. The Third Circuit has decided that a quasi-judicial state official who has the right and responsibility to decide disputes presented to a state administrative agency will be exposed to federal suit in his or her individual, as well as official capacity, if he or she makes a wrong (or even right) decision. This application of *Ex parte Young* is overly broad and contrary to the doctrine's principles. There is no evidence that Congress intended nor is there any need for such a result. Thus, the Third Circuit's decisions must be reversed.

The Court should also grant this petition to decide what standard of review should apply when, and if, a federal court reviews a state commission's determination under § 252 of the Act. Should the standard be *de novo*, as the Third Circuit held, or deferential? If one accepts that state commissions are now "regulating on behalf of Congress," 271 F.3d at 510 (App. 25a), and are thereby authorized to develop federal telecommunications policy, then federal courts should defer to state commissions' interpretations of the Act. The PUC urges a deferential standard as consistent with the faith placed by Congress in state commissions and state commissions' recognized expertise in handling the complexities of local telecommunications regulation.

Finally, this petition should be granted because the immunity issues raised herein are substantially similar, but not identical, to the issues pending before the Court in both *Verizon Maryland, Inc. v. Public Svc. Comm'n of Md.*, Nos. 00-1531 and 00-1711 (U.S.) (reviewing *Bell Atlantic Md., Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001)), and *Mathias v. WorldCom Tech., Inc.*, No. 00-878 (U.S.) (reviewing *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566 (7th Cir. 1999)). The pending cases involve immunity in the context of enforcement proceedings, whereas this petition concerns immunity in the context of arbitration proceedings.

## ARGUMENT

### I. SINCE PENNSYLVANIA HAS NOT WAIVED IMMUNITY, FEDERAL COURTS SHOULD NOT HAVE EXERCISED JURISDICTION OVER THE PUC IN THE UNDERLYING PRIVATE PARTY SUITS BROUGHT PURSUANT TO 47 U.S.C. § 252(E)(6) AND 28 U.S.C. § 1331.

Generally, States are immune from suit by private parties in federal court pursuant to the doctrine of sovereign immunity as protected by the Eleventh Amendment. U.S. CONST. amend. XI; *Board of Tr. of Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 962 (2001); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). This immunity extends to state agencies and departments. See *C.H., ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201 (3d Cir. 2000) (*en banc*). Immunity is subject to three exceptions: 1) congressional abrogation, 2) state waiver, and 3) suits against individual state officers for prospective relief to end an ongoing violation of federal law. None of the exceptions should have been applied in these cases.

### A. Immunity Has Not Been Abrogated

The first exception—abrogation—cannot apply because the Telecommunications Act of 1996 was an exercise of congressional Commerce Clause power. Congress may not abrogate state sovereign immunity when a statute is passed pursuant to its Article I powers, such as the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *Garrett*, 121 S. Ct. 962. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996). But for *Seminole Tribe*, section 252(e)(6) may well have been viewed as an abrogation of immunity.

### B. Immunity Has Not Been Waived

The second exception—waiver—does not apply because Pennsylvania has not consented to suit. Consent is necessary to find waiver. *College Savings Bank*, 527 U.S. at 670. The waiver by the state must be voluntary and the test for determining voluntariness is a stringent one. *Id.* at 675. The state either must voluntarily invoke federal court jurisdiction by bringing suit (not the case here) or must make a "'clear declaration' that it intends to submit itself" to federal court jurisdiction. *Id.* at 676. The decision to waive immunity must be an "altogether voluntary" one, and, as with any other waiver of a constitutional right, there must be an "intentional relinquishment or abandonment of a known right or privilege." *Id.* at 681-82. Correspondingly, Congress must speak with a "clear voice" to ensure that states exercise their choice cognizant of the consequences. *Pennhurst State Sch. And Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*).

The constructive waiver doctrine formerly established in *Parden v. Terminal R. of Alabama State Docks Dept.*, 377 U.S. 184 (1964) has been overruled. *College Savings Bank*,

527 U.S. at 680 ("Whatever may remain of our decision in *Parden* is expressly overruled."); *id.* ("We think that the constructive-waiver experiment of Parden was ill conceived, and see no merit in attempting to salvage any remnant of it."). The constructive waiver theory was abolished to prohibit Congress from statutorily coercing a state into relinquishing its sovereign immunity on threat of the state being excluded from participating in an otherwise lawful and permissible activity. *College Savings Bank*, 527 U.S. at 687; *id.* at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."). "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748, (1999).

The difficulty faced by the Third Circuit was that *College Savings Bank* distinguished conditional types of constructive waiver in two cases. In *Petty v. Missouri Bridge Comm'n*, 359 U.S. 275, 277-78 (1959), two states entered into an interstate compact, approved by Congress, that contained a sue-or-be-sued clause. The Court held that the states assumed the conditions, such as consent to suit, that Congress attached to the compact by accepting the conditions and acting on the compact containing those conditions. *Id.* at 281-82. In *South Dakota v. Dole*, 483 U.S. 203, 208-09 (1987), the Court upheld a federal law, passed pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, that conditioned a state's receipt of federal highway funds on the establishment of a minimum drinking age of 21 in the state; the Court found that the condition on the funds was clearly stated and that acceptance of the funds entailed agreement to those conditions. The *College Savings* Court described these cases as "fundamentally different" from *Parden*-type forced constructive

waivers because both the grant of consent to form an interstate compact and the disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a state is not otherwise entitled to receive, and to which Congress can attach conditions as long as the conditions are not coercive. *College Savings Bank*, 527 U.S. at 686-87.

Here, the Third Circuit has erroneously concluded that Pennsylvania waived immunity when the PUC continued to regulate local telecommunications competition. The court erred by reading *College Savings Bank* to allow Congress "attach whatever conditions it chooses," 271 F.3d at 505 (App. 15a), to a congressional gratuity. It also erred in holding that state regulation is a congressional gratuity. *Id.* at 509 (App. 23a). The court's gratuity holding is a misapplication of 47 U.S.C. § 261(b) in that the court held "with the 1996 Act, Congress federalized the regulation of competition for local telecommunications service. . . . The state commission's authority to regulate comes from §252(b) and (e), not from its own sovereign authority." *Id.* at 509-510 (App. 23a-25a). The Third Circuit further mischaracterize the Act as "giving [states] back some regulatory power," *id.* at 510 (App. 24a), subject to "any condition [Congress] chooses." *Id.* (App. 25a). The conditions include: 1) waiver of immunity under section 252(e)(6), and 2) exclusivity of federal court review under section 252(e)(4). These conditions are said to be "sufficiently clear" from the language of the Act. 271 F.3d at 512 (App. 28a). This legal theory is wholly without merit. It rests on the extraordinary notion that Pennsylvania received a "gratuity" in a simultaneous removal and return of authority to regulate local telecommunications competition under the Act.

The Third Circuit's view does not enjoy full concurrence among the Courts of Appeals. The Fourth and Sixth Circuits have rejected similar reasoning. *Bell Atlantic Md., Inc. v.*

*MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), *cert. granted*, 533 U.S. 928 (2001) (upholding immunity claims of Maryland commission); *Bell South Telecomms. v. North Carolina Utils. Comm'n*, 240 F.3d 270 (4th Cir. 2001) (upholding immunity claims of North Carolina commission); *GTE North, Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000) (opining "the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions."). Similarly, scholars have criticized the theory. Case Comment, State Sovereign Immunity: *MCI Telecom. v. Illinois Bell*, 114 HARV. L. REV. 1819 (2001); Jake C. Blavat, Note, 2000 WIS. L. REV. 1149 (2000) (arguing Eleventh Amendment denies federal court jurisdiction over state commissions that implement the Act).

1. ***Congress Does Not Occupy Entire Field of Local Telecommunications Competition And Invite States To Regulate Subject to Waiver and Other Conditions, But If It Does, Then Its Actions Are Impermissibly Coercive.***

Congress' power to regulate the American economy includes the power to regulate local telecommunications competition. U.S. CONST. art. I, § 8, cl. 3; *AT&T Corp.*, *supra*. Pursuant to Commerce Clause powers, the Act imposes certain duties and obligations on local exchange carriers for the purpose of advancing the development of competitive markets. See 47 U.S.C. § 251 (setting forth duties). These duties and obligations overlay existing state requirements, which state requirements are preserved as long as they are not inconsistent with the Act. 47 U.S.C. § 261(b). The FCC resolves any questions of conflict after notice and comment. 47 U.S.C. § 253(d).

Congress relies upon the expertise of state commissions to carry out the congressional aims. A number of states, like Pennsylvania, had embarked upon the development of competitive markets and Congress was desirous of letting

them continue. See, e.g., *Local Competition Order*, 11 FCC Rcd 15499 (FCC 96-325, rel. Aug. 8, 1996) at para. 2 (FCC finds it has "benefited enormously from the expertise and experience" of the state commissioners and their staffs); *see also id.* at para. 53.

Aware that some states might not have sufficient resources to undertake the development of competitive markets, at least not immediately, *Local Competition Order* at para. 48 (noting limited resources of North Dakota commission), Congress called upon the FCC to shoulder the burdens of implementing a pro-competitive regulatory regime in those instances where a state was unable or unwilling to do so. 47 U.S.C. § 252(e)(5). But, Congress emphasized its dependence upon state commissions by requiring carriers to approach the state commissions in the first instance. 47 U.S.C. § 252(e)(1).

In Pennsylvania, implementation of the Act was swift.[6] Given the General Assembly's previous commitment to the development of competitive markets, there was also no need to amend the Public Utility Code. Every duty and obligation imposed on carriers and corresponding power of a state commission contemplated by the Act is provided for under the Code.[7]

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[6] The PUC has not pursued an argument that the Act constitutes an impermissible commandeering of state resources under *Printz v. U.S.*, 521 U.S. 898 (1997).

[7] For example, the PUC regulates "interconnection agreements" because, among other things, it has the general administrative power and authority to supervise and regulate all public utilities doing business in Pennsylvania, 66 Pa.C.S. § 501(b) and to vary, reform and revise contracts entered into by these public utilities, 66 Pa.C.S. § 508. The PUC sets "interconnection and network element charges" and "wholesale prices" because it has the power to fix just and reasonable rates for the services provided by telecommunications utilities to customers, 66 Pa.C.S. § 1301, and, to require a telecommunications utility to "unbundle" basic network functions necessary for delivery of competitive services, 66 Pa.C.S. § 3005(e)(1).

Recently, the FCC recognized the successful implementation of the Act in Pennsylvania. "[L]ocal exchange markets in Pennsylvania [are open] to competition. . . . [C]ompeting carriers in Pennsylvania serve approximately one million lines, one-third of which are residential, using all three entry paths available under the Act." *In the Matter of Applications of Verizon Pa., Inc.*, 16 FCC Rcd 17419 (FCC 01-269, rel. Sep. 19, 2001) at paras. 1, 2.

Even *assuming arguendo* that Congress has the power to occupy the entire field of local telecommunications competition regulation, there is no provision of the Act indicating Congress' intent to do so. In fact, Congress specifically prohibited construction of any provision as preempting any State commission from enforcing regulations prescribed prior to and after the date of enactment, if such regulations are not inconsistent with the Act. 47 U.S.C. § 261(b). Thus, state authority is generally preserved, not eliminated.

There is also an absence of any language (or legislative history) to support a finding that Congress intended to extend a conditional invitation to states.[8] The best text any opponent can produce as providing notice of a conditional invitation is section 252(e)(5), which provides for the FCC to step into the shoes of the states in certain circumstances. Only one with an active imagination, however, can construct such an intent from section 252(e)(5). Rather than an invitation to engage in regulation, it merely ensures the new requirements are implemented nationally, even in those states with limited financial or technical resources.

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[8] Unlike the Act addressed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), Congress did not advise the States that they had to submit to federal authority in order continue regulating. See *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231 (3d Cir. 1995) (addressing Pennsylvania's actions under the *Hodel* scheme).

Alternatively, if section 252(e)(5) is an invitation with conditions attached, the invitation is coercive. What reason other than coercion does any state have to agree to do work for the benefit of Congress, without getting paid for the resources spent, waive their immunity, and disassociate their administrative agencies from the oversight of its state courts! "Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." *College Savings Bank*, 527 U.S. at 683. Thus, the invitation is tantamount to abrogation and cannot be given effect.

### 2. *Pennsylvania Intends to Preserve its Immunity, not Waive It.*

The Constitution of the Commonwealth of Pennsylvania reserves to the General Assembly the right to waive immunity from private party suit. PA. CONST., art. I, § 11; *Chittister v. Dep't of Commun. and Econ. Dev.*, 226 F.3d 223, 227 (3rd Cir. 2000). A private party wishing to sue the Pennsylvania Commission must refer the Court to "any provision expressly waiving Pennsylvania's Eleventh Amendment immunity." *Pennhurst II*, 465 U.S. at 103 n. 12. "Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

The General Assembly has not expressly authorized the PUC to waive immunity.[9] Rather, it is the General Assembly's intent that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit. 1 Pa.C.S. § 2310 (West Supp. 2000). Any exceptions are provided for by statute. *Id.*

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[9] The PUC is a creature of the General Assembly and has only those duties, responsibilities and jurisdiction given to it by the General Assembly. *Western Pa. Water Co. v. Pa. P.U.C.*, 311 A.2d 370, 373 (Pa. Cmwlth. 1973).

Immunity has been waived only in a select number of circumstances. The specific instances of waiver are found in 42 Pa.C.S. § 8522 (relating to judiciary and judicial procedure) and 62 Pa.C.S. § 1702 (West Supp. 2001) (relating to procurement). Due to their complete silence on the matter, none of these provide any support for finding waiver under the federal Act. Likewise, nothing in the PUC's enabling statute specifically provides for waiver of immunity in regard to the Act. Certainly, the pre-1996 provisions of the Public Utility Code cannot be fairly read to direct the PUC to continue regulating pursuant to so-called voluntary conditions of a later enacted federal statute.

The General Assembly reaffirmed its sovereign immunity in 1998, two years after passage of the Act, in 1 Pa.C.S. § 2310. This post-1996 affirmation of sovereign immunity either directly contradicts a finding of waiver or creates ambiguity.

In spite of Pennsylvania's silence, the Third Circuit premised a finding of waiver upon the Seventh Circuit's rationale that waiver can be inferred if a State has not "taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress." *MCI Telcomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 n. 10 (7th Cir. 2000), cited at 271 F.3d at 511-512 (App. 27a); *id.* at 525-26 (App. 52a) (Ambro, J., concurring) ("Congress . . . has mandated that the states take action if they do not wish to waive their immunity. Conversely, the affirmative act indicating an intention to accept the gratuity is not the simple acceptance of new money or new authority, it is the failure to refuse the grant of an authority previously possessed.") (footnote omitted). The Third Circuit's view is indistinguishable from the "constructive waiver" doctrine discredited by this Court in *College Savings Bank*. Thus, the Court should grant this petition and reverse the Third Circuit's decision.

### 3. *Clear Notice of the Waiver Condition Is Lacking.*

Section 252(e)(6) is said to provide notice that a state's immunity will be waived if the state commission continues to regulate. 271 F.3d at 512 (App. 28a). It provides that a party aggrieved by a state commission's determination "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. § 252(e)(6). Contrary to the "clear voice" requirement of *Pennhurst I*, 451 U.S. at 17, the plain language of section 252(e)(6) does not make one cognizant of the consequence of immunity waiver upon regulation. The most reasonable reading (since it does not abrogate immunity) is that the section gives a district court jurisdiction to review certain state orders, subject to the constitutional doctrine of state sovereign immunity. *Cf.* 28 U.S.C. § 2342 (providing court of appeals has exclusive jurisdiction to review orders of the FCC). The district court's jurisdiction is not superior to immunity. Rather, "the constitution is superior to any ordinary act of the legislature[;] the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). If there is a hint of notice of waiver, it is most certainly buried in "ambiguity." *See AT&T Corp.*, 525 U.S. at 397. Thus, the Act does not provide states with the requisite clear notice that immunity will be waived if a state commission regulates.

### 4. *States Should Not Be Penalized for Applying Federal Law.*

Members of the Pennsylvania commission, and other commissions, take an oath to uphold the federal Constitution. The fact that a state commission requires its state certified public utilities to obey the new requirements of a federal law should not be deemed a waiver of constitutional protections. Instead, implementation of the Act demonstrates respect for

the supremacy of federal law. U.S. CONST. art. VI (Supremacy Clause). Inferring waiver from implementation improperly penalizes the PUC for requiring public utilities to follow federal law.

### 5. *Congress Is Not Allowed To Abrogate Immunity At Will.*

The Third Circuit's decision effectively allows Congress to abrogate state sovereign immunity at will, contrary to *Seminole Tribe* and *College Savings Bank*. What the Third Circuit failed to recognize is that "the bounds of the 'gratuity' exception—and hence the scope of state sovereign immunity itself—must be defined by the text and the structure of the Constitution, not by Congressional decree." Case Comment, 114 HARV. L. REV. 1819. The Third Circuit has "effectively converted sovereign immunity—a constitutional right and limitation on federal power—into little more than a rule of statutory construction Congress can abrogate at will." *Id.* at 1826.

## II. *EX PARTE YOUNG* DOES NOT GIVE FEDERAL COURTS JURISDICTION OVER COMMISSIONERS WHEN A PARTY IS AGGRIEVED BY A §252 DETERMINATION.

The third exception—the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908)—does not apply. The doctrine allows suit against individual state officers for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law. The theory behind *Young* is that a suit to halt the enforcement of a state law in conflict with the federal constitution is an action against the individual officer charged with that enforcement and ceases to be an action against the state to which sovereign immunity extends; the officer is stripped of his official or representative character and becomes subject to the consequences of his individual conduct. *Young*, 209 U.S. at 159-60; *Pennhurst II*, 465 U.S.at

103. The relief sought must be prospective, declaratory, or injunctive relief governing an officer's future conduct and cannot be retrospective, such as money damages. *Pennhurst II*, 465 U.S. at 102-03. The *Young* doctrine is viewed as necessary to permit federal courts to vindicate federal rights and to hold state officials responsible to the "supreme authority of the United States." *Id.* at 105. However, *Young* does not apply if, although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit in fact is against the state. *Pennhurst II*, 465 U.S. at 101.

An action cannot be maintained under *Young* when the suit against the state officer affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state. *See, e.g., Coeur d'Alene*, 521 U.S. at 287; *id.* at 296-97 (O'Connor, J., concurring in part and concurring in the judgment). This exception is best understood as an application of the general rule that Young does not permit actions that, although nominally against state officials, in reality are against the state itself. *Pennhurst II*, 465 U.S. at 102. *See also Seminole Tribe*, 517 U.S. at 74.

### 1. Ex parte Young *Does Not Permit a Suit to Go Forward Against State Officials When the State Is the Real Party in Interest.*

The underlying complaints are an appeal of an administrative agency decision in which federal law has been applied. Application of the *Young* doctrine to allow federal suit against individual members of a State commission without their consent—merely due to the commissioner's vote with respect to the approval, rejection or enforcement an interconnection agreement under section 252 of the Act—completely undermines the constitutional doctrine of sovereign immunity. It is also contrary to the proper application of the *Young* doctrine. The party claiming to be aggrieved, not the State, initiates a section 252 proceeding. A commissioner

has a duty to vote on matters brought before the Commission for resolution, absent a conflict of interest or other infirmity. As the Fourth Circuit has correctly recognized, it is an affront to a State's sovereignty to bring an individual State officer before a federal court to answer to the assertion of a private citizen that the officer, acting in a quasi-judicial capacity, cast a wrong vote while acting within the scope of his or her authority. *Bell Atlantic Md., Inc.*, 240 F.3d at 298.

It is an administrative agency, not individual officials within the agency, which defends its own decision when a party seeks judicial review of that decision.[10] The agency is the real party in interest in such a proceeding, consistent with both federal and state law. Federal courts have routinely found state agencies to be the only proper party in an action challenging that agency's order.[11] "The Eleventh Amendment bars a suit against state officials when 'the state is the real party in interest.'" *Pennhurst II*, 465 U.S. at 101. *See* U.S. CONST. amend. XI; *Coeur d'Alene*, 521 U.S. at 269.

The State commission acts in the public interest of the people within its State when a State commission makes a determination to approve or reject an interconnection agreement between regulated utilities. "The actions taken by a state will significantly affect the development of local competition in that state." *Local Competition Order* at para. 137. The regulation of utilities itself "is one of the most important of

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[10] All members of a commission may not have concurred in the agency's decision.

[11] *See Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3d Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate its rules); *Stevens v. Bartholomew*, 222 F.2d 804, 806 (D.C. Cir. 1955) (state agency managing highway project has sovereign immunity precluding injunction against federally-funded state highway authority); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (collateral attack on agency's order made agency an indispensable party).

the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989). The review also includes the establishment of rates, a matter particularly reserved for "States." *AT&T Corp.*, 525 U.S. at 384.

Congress preserved a primary role for State commissions throughout the process of interconnection agreement review that is unique. No regulated carrier shares a State commission's interest in this type of case. A State commission's interest goes beyond a utility's narrow business interest to the broad public interest. Moreover, the parties want relief from state commission, namely further proceedings to correct what they perceive to be error. Thus, the state is the real party in interest in appeals under section 252(e)(6).

### 2. Young *Does Not Apply When State Official's Action is Authorized.*

If an error of federal law exists in the challenged PUC determination, the error is insufficient basis to refuse immunity. In these section 252(e)(6) cases, there is no question that federal law authorizes the state commissions (acting through their individual member commissioners) to decide whether to approve or reject proposed interconnection agreements. 47 U.S.C. § 252(e)(1). The power to adjudicate the dispute under federal law includes the power to make an erroneous decision. "Jurisdiction is the power to decide erroneously as well as correctly." 20 AM. JUR. 2D *Courts* § 57 (1995). A state officer acts *ultra vires* only when he acts "without any authority whatever," so that the a claim of error is the exercise of delegated power is not sufficient to lift the bar of immunity. *Pennhurst II*, 465 U.S. at 101 n.11. Thus, where Congress authorizes a state commission to approve or reject an interconnection agreement, the commission members are entitled to immunity when they make their decision. Indeed, under the Third Circuit's analysis, but for the doctrine of absolute judicial immunity (see 46 AM. JUR. 2D *Judges*

§§ 74-77 (1994), federal complaints could be filed against state court judges when the complainant disagrees with the state court's interpretation of a federal statute.

### 3. *Judicial Review of State Commission Determinations Negates Any Need for Application of* Ex parte Young *In a §252(e)(6) Case.*

*Federal Court Review*

Judicial review of state commission determinations is available under several avenues. If the Court holds that state commissions waive immunity when they act pursuant to section 252, then review of state commission determinations is available in federal district court and *Ex parte Young* need not apply.[12]

*State Court Review*

The non-application of the *Ex parte Young* doctrine is further dictated by the availability of state court review, notwithstanding Congress's attempt to prohibit such review. Each state provides for appeals from State commission decisions in state court. It is well established that state courts are presumed competent to review lower tribunal determinations for compliance with federal and state law. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). Where an adequate remedy exists, equity need not apply. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

The present impediment to state court review—an impediment created by Congress in section 252(e)(4) (purporting to prohibit state court review)—cannot withstand judicial scrutiny. Congress lacks authority under the Commerce Clause to sever the relationship between a State court and a

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[12] The United States can also bring suit against a State in federal court. *United States v. Texas*, 143 U.S. 621 (1892).

State commission. No party has cited any authority for Congress having such authority. Having no authority, Congress is prohibited by the Tenth Amendment from requiring State commission decisions to be reviewed in federal courts to the exclusion of state courts. U.S. CONST. amend. X.

The Pennsylvania Constitution and statutes explicitly provide for judicial review of Pennsylvania Commission's orders as of right. PA CONST., art. V, § 9; see also 42 Pa.C.S. § 763 (designating Commonwealth Court of Pennsylvania to hear appeals). This right extends to review of federal questions under section 252. *Bell Atlantic*, 763 A.2d 440. Any disenfranchisement of the Pennsylvania Judiciary, one of the equal and independent branches of Pennsylvania Government, cannot be upheld as consistent with the law or our nation's scheme of federalism.

## III. WHEN STATE ADMINISTRATIVE AGENCIES ACT ON BEHALF OF CONGRESS, FEDERAL COURTS SHOULD APPLY A DEFERENTIAL, NOT *DE NOVO*, STANDARD OF REVIEW TO THE AGENCIES' INTERPRETATION OF FEDERAL LAW.

Section 252(e)(6) provides for judicial review and a determination whether the approved agreement "meets the requirements" of the Act, see 47 U.S.C. § 252(e)(6), but does not prescribe the standard for that review. *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), accords the construction of a federal statute by a federal agency deference by reviewing courts when there has been an explicit or implicit delegation of authority to an agency to fill a gap in the statute and the agency interpretation is a reasonable one. *Chevron* deference is warranted when the agency was given the power to make rules carrying the force of law and when the interpretation at issue was promulgated in the exercise of that authority. *United States v.*

*Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Delegation may be shown by the grant to an agency of power to engage in adjudication or notice- and-comment rulemaking. *Id.* at 2172. Generally, such deference is not accorded to the interpretations of federal statutes by state agencies. 271 F.3d at 516 (App. 34a); *GTE South Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir.1999).

Due to the unique structure of the Act, a state commission's interpretations of federal law, made in reviewing and approving interconnection agreements, should be entitled to the same deference as would the FCC's interpretations if the FCC were primarily responsible for reviewing the agreements. The state commissions possess the same institutional competence as the FCC to make such decisions in the area of telecommunications law. *Local Competition Order*, *supra*; Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 22-23 (1999). If the state commissions enjoy the confidence of Congress, they (and their interpretations of federal law) should enjoy similar confidence from the federal courts. Weiser at 36. State commissions' power to resolve issues in arbitration and to approve or reject interconnection agreements have the force of law beyond the relationship of the parties to the agreement. The approved agreement becomes in effect a tariff to which other carriers can "opt-in." 47 U.S.C. § 252(i). Deference to the state commissions would not conflict with the rulemaking authority of the FCC as state commissions are bound to follow all lawful provisions of the Act and FCC implementing regulations. *AT&T Corp.*, *supra*.

Therefore, a deferential standard of review should be applied to any PUC legal interpretations contained in the arbitration and interconnection agreement.[13]

## CONCLUSION

The Court should grant this petition for writs of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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April 4, 2002

[13] If Petitioners are subject to federal court jurisdiction, a remand to the Third Circuit is required for reconsideration of the directory publishing services issue in light of a deferential standard of review.

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed November 2, 2001]

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Nos. 00-2257 and 00-2258

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MCI TELECOMMUNICATION CORPORATION, a Delaware Corporation; MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware Corporation;

AT&T COMMUNICATION OF PENNSYLVANIA;
UNITED STATES OF AMERICA,
*Intervenors-Plaintiffs in District Court,*

v.

BELL ATLANTIC-PENNSYLVANIA; PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA M. BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission

PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,

*Appellants* (00-2257),

BELL ATLANTIC-PENNSYLVANIA, INC.,

*Appellant* (00-2258).

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Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil Action No. 97-cv-01857)
District Judge: Honorable Sylvia H. Rambo

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Argued June 21, 2001

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OPINION OF THE COURT

Before: ROTH, AMBRO and FUENTES, *Circuit Judges*

ROTH, *Circuit Judge*:

In passing the Telecommunications Act of 1996, Congress altered the regulatory scheme for local telephone service. The Act requires that local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law. Under the Act, the incumbent local telephone service carriers must negotiate or arbitrate agreements with competitive local carriers, allowing entering carriers either to connect their equipment to the existing network or to purchase or lease elements and services of the existing network. The terms, rates, and conditions of such arrangements are set forth in interconnection agreements established between the carriers. The state utility commissions are empowered, but not required, to review and give final approval to interconnection agreements to ensure that they comport with federal law.

Verizon Pennsylvania, Inc. (Verizon—known at that time as Bell Atlantic-Pennsylvania, Inc.), the incumbent local carrier in Pennsylvania, entered into negotiations with MCI/Worldcom (Worldcom), a competing carrier which sought to provide local telephone service. After various negotiations and arbitrations by the Pennsylvania Public Utility Commission (PUC), the parties established an interconnection agreement and submitted it to the PUC which approved it contingent on certain revisions and the incorporation of certain rates. Worldcom then brought suit in federal court against Verizon, the PUC, and the PUC Commissioners, under 47 U.S.C. § 252(e)(6), the judicial review provision of the Act, to challenge certain terms of the

agreement; Verizon counterclaimed and cross-claimed to challenge other aspects of the agreement. The PUC and PUC Commissioners moved to dismiss the action, arguing that they were immune from suit under the Eleventh Amendment of the United States Constitution. The District Court rejected the immunity claim and the PUC did not appeal at that time. The District Court then resolved all the substantive claims asserted by Worldcom and Verizon. The PUC and Verizon each appealed and the appeals were consolidated.

The District Court had jurisdiction to review the interconnection agreement pursuant to 47 U.S.C. S 252(e)(6) and had general federal question jurisdiction pursuant to 28 U.S.C. S 1331. We have jurisdiction over the final decision of a District Court, pursuant to 28 U.S.C. S 1291.

For the reasons that follow, we conclude that the PUC and the Commissioners are not entitled to Eleventh Amendment immunity from suit in federal court under the 1996 Act. We will, therefore, affirm the decision of the District Court on this issue. On the questions, raised by Verizon and the PUC regarding the terms of the interconnection agreement, we will affirm the District Court in part and reverse it in part.

I. Statutory Background

Prior to 1996, local telephone service operated as a monopoly, subject to exclusive regulation by the several states. In each local service area, the states would grant a monopoly franchise to one local exchange carrier, which owned the facilities and equipment necessary to provide telephone service. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 370 (1999) (Iowa Utils. I). With the Telecommunications Act of 1996, Congress fundamentally restructured local telephone markets by eliminating state-granted local service monopolies. See id. The Act preempts exclusive state regulation of local monopolies in favor of the competitive scheme established in 47 U.S.C. §§251 and 252. *See*

*AT&T Communications v. Bellsouth Telecomm. Inc.*, 238 F.3d 636, 641 (5th Cir.), *reh'g en banc denied*, 252 F.3d 437 (5th Cir. 2001) (*Bellsouth*).

The Act essentially requires incumbent local exchange carriers (ILECs) to share their networks and services with competitors seeking entry into the local service market. *See MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001). Under the Act, a new entrant to the local telephone market, known as a competitive local exchange carrier (CLEC), is able to compete with an ILEC without having to bear the prohibitive cost of building its own telecommunications network. *See id.* Both an ILEC and a CLEC are required to "negotiate in good faith" the "terms and conditions of agreements" which will permit the CLEC, as well as other providers, to share the network and to provide service. 47 U.S.C. § 251(c)(1). The FCC is empowered to promulgate regulations to implement the requirements of the Act. 47 U.S.C. § 251(d)(1); *see also Iowa Utils. I*, 525 U.S. at 384 (upholding FCC rulemaking authority, including its power to determine the methodology for establishing prices).

Section 251 and FCC regulations establish three methods of providing a CLEC access to a local network. *See Iowa Utils. I*, 525 U.S. at 370; *GTE South, Inc. v. Morrison*, 199 F.3d 733, 737 (4th Cir. 1999). First, a CLEC may build its own network and "interconnect" with the incumbent network. 47 U.S.C. § 251(c)(2). Such interconnection must be, *inter alia*, for the "transmission and routing of telephone exchange service and exchange access," 47 U.S.C. S 251(c)(2)(A), "at any technically feasible point within the [incumbent] carrier's network," 47 U.S.C.S 251(c)(2)(B), and "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D), 47 C.F.R. § 51.305. An ILEC which denies a CLEC access to the network at a particular point must "prove to the state commission that interconnection at that point is not technically feasible." 47 C.F.R. § 51.305(e).

Second, a CLEC may lease individual elements of the existing network on an "unbundled basis" at"any technically feasible point" on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3), 47 C.F.R. §§ 51.307-51.319. A network element is "a facility or equipment used in the provision of a telecommunications service," i.e.,"features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service." 47 U.S.C. § 153(29). The FCC determines the network elements that must be made available for purposes of § 251(c)(3); in so doing, it must consider 1) whether access to proprietary network elements is necessary and 2) whether the failure to provide access to a given element would "impair" the ability of the CLEC to provide services. 47 U.S.C. § 251(d)(2).

Lease rates for network elements must be based on forward-looking costs, meaning the sum of the "total element long-run incremental cost of the element," plus a reasonable allocation of "forward-looking common costs." 47 C.F.R. § 51.505(a)(1), (2). Total element long-run incremental cost, or TELRIC, is the "forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element." 47 C.F.R. § 51.505(b).

Third, a CLEC may purchase from the ILEC for resale "at wholesale rates any telecommunications service the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A), 47 C.F.R. §§ 51.601-51.617. In other words, the CLEC will purchase telecommunications service from the ILEC at wholesale rates and resell those services to customers. Telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be

effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Telecommunications, in turn, means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

The FCC established a wholesale pricing standard for § 251(c)(4), equal to "the rate for the telecommunications service, less avoided retail costs." 47 C.F.R.§ 51.607. The regulations define avoided retail costs as "those costs that reasonably can be avoided when an incumbent ILEC provides a telecommunication service for resale at wholesale rates to a requesting carrier." 47 C.F.R. § 51.609(b). The Eighth Circuit has, however, struck down that pricing standard as contrary to the Act. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 755-56 (8th Cir. 2000), *cert. granted in part, denied in relevant part*, 121 S. Ct. 878 (2001) (*Iowa Utils. II*).

In addition, in gaining access to a local network, a CLEC must be permitted to physically collocate on the ILEC's premises any equipment necessary for interconnection or for access to unbundled network elements, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(6). An ILEC may provide for virtual collocation instead if it demonstrates that physical collocation is not practical for technical reasons or because of space limitations. 47 U.S.C. § 251(c)(6).

Section 252 sets out the process by which interconnection agreements between ILECs and CLECs are to be established. *See MCI*, 222 F.3d at 328; GTE South, 199 F.3d at 737. An incumbent and a requesting carrier may "negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). Such negotiations generally will begin with a request for interconnection by the CLEC. 47 U.S.C. § 252(a)(1). At any time during negotiations, either party may ask the state utility commission to participate in negotiations and mediate any

differences. 47 U.S.C. § 252(a)(2). The Act's clear preference is for such negotiated agreements. *See Iowa Utils. I*, 525 U.S. at 405 (Thomas, J., *concurring in part and dissenting in part*). An agreement reached through negotiation need not conform to all the detailed, specific requirements of § 251; negotiation consequently bestows a benefit to those carriers able to resolve issues through negotiation and compromise. *See MCI Telecomm. Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000); 47 U.S.C. § 252(a)(1). A negotiated agreement must merely be nondiscriminatory to a carrier not a party to the agreement and also be in the public interest. *See* 47 U.S.C. § 252(e)(2)(A).

Negotiations may, however, prove unsuccessful. *Cf. GTE South*, 199 F.3d at 737 (stating that it is hard to see how negotiations would not fail). Either party, during the period from 135 to 160 days after a CLEC's request for interconnection, may petition a state utility commission to arbitrate any unresolved issues. 47 U.S.C. § 252(b)(1). The Act and FCC regulations detail the procedures and standards that the state must follow in conducting the arbitration. 47 U.S.C. § 252(b), (c), (d); *MCI*, 222 F.3d at 328. The state utility commission must resolve all the issues raised in the arbitration and may impose appropriate conditions on the parties in order to resolve those issues. 47 U.S.C. § 252(b)(4)(C). When a state utility commission engages in arbitration, it must ensure that resolution of the issues and any conditions imposed on the parties to the arbitration meet the requirements of § 251 and of the FCC regulations, it must establish any rates, and it must provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c). The arbitrated terms are incorporated into the parties' interconnection agreement.

Any interconnection agreement, whether reached through negotiation or arbitration, must be submitted to the state utility commission, which "shall approve or reject the agreement, with written findings as to any deficiencies."

47 U.S.C. § 252(e)(1). The standards for the commission's review depend, however, on whether the agreement was reached by negotiation or by arbitration. A state commission may reject a negotiated agreement only if it finds that 1) the agreement discriminates against a carrier not a party to the agreement or 2) implementation of the agreement would not be consistent with the "public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A); *see also MCI v. U.S. West*, 204 F.3d at 1266. A state utility commission may reject an arbitrated agreement, or part of an arbitrated agreement, if it finds that the agreement, or part of the agreement, does not meet the requirements of § 251, including FCC regulations under § 251, or the pricing standards of § 252(d). 47 U.S.C. § 252(e)(2)(B); *see also MCI*, 222 F.3d at 328-29. If the state utility commission does not act to approve or reject a negotiated agreement within 90 days of its submission or an arbitrated agreement within 30 days of submission, the agreement "shall be deemed approved." *See* 47 U.S.C. § 252(e)(4); 47 C.F.R. § 51.801(c).

If a state utility commission "fails to act" to carry out any of its responsibilities under § 252, the FCC is to assume responsibility and act in place of the state commission in carrying out these duties. 47 U.S.C. § 252(e)(5); 47 C.F.R. § 51.803-51.807. Pursuant to FCC regulations, a state utility commission "fails to act" if it fails to respond within a reasonable amount of time to a request for mediation or arbitration. 47 C.F.R. § 51.801(b). If a state utility commission fails to act, the carrier's exclusive remedy is to present the issues and agreement to the FCC and to seek judicial review of any FCC determinations on those issues. 47 U.S.C. § 252(e)(4); *see also MCI*, 222 F.3d at 329. A state commission does not fail to act if, because of the commission's inaction, an agreement is deemed approved. 47 C.F.R. § 51.801(c). As the Seventh Circuit explained, sections 252(e)(1), (e)(4), and (e)(5) together "create a scheme that

provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place." *See MCI*, 222 F.3d at 329.

When a state utility commission has approved or rejected an agreement under § 252(e)(1), "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements" of §§ 251 and 252. 47 U.S.C. § 252(e)(6). No state court has jurisdiction to review the actions of a state commission in approving or rejecting an interconnection agreement. 47 U.S.C. § 252(e)(4).

II. Litigation Background

Worldcom requested interconnection and began negotiations with incumbent carrier Verizon for an agreement to permit Worldcom to provide local service in Pennsylvania. Certain issues were not resolved by negotiation. The parties then went to arbitration before the PUC, which issued orders resolving those issues and requiring the arbitrated terms to be incorporated into the final agreement. After continued negotiations and additional rulings from the PUC, the parties reached a final agreement and submitted it to the PUC, which approved it contingent on certain revisions and the incorporation of certain rates.

Worldcom then brought suit under § 252(e)(6) in federal court, naming as defendants the PUC, several individual PUC Commissioners, and Verizon. The suit challenged several terms of the approved agreement. AT&T Communications of Pennsylvania (AT&T), another CLEC seeking to gain entry into local telephone service, intervened as a plaintiff. Verizon counterclaimed against Worldcom and AT&T and cross-claimed against the PUC to challenge other aspects of the agreement. The United States intervened as a plaintiff in order to defend the constitutionality of § 252(e)(6).

The PUC and the Commissioners moved to dismiss the action on Eleventh Amendment grounds, arguing that they had sovereign immunity from suit in federal court under the Act and that § 252(e)(6), which authorized the suit, was unconstitutional. The District Court denied the motions.[1]

The PUC and the Commissioners did not at that time appeal the denial of their Eleventh Amendment immunity claim.

Because there were no disputed issues of fact, the parties then cross-moved for summary judgment. The Magistrate Judge made a Report and Recommendation, which the District Court adopted in part and rejected in part. The District Court considered and resolved five issues that now are on appeal before this Court.

The first issue concerns interconnection in Local Access and Transport Areas (LATAs). The PUC had required that Worldcom interconnect in each access tandem serving area, rather than at a single point within each LATA. An access tandem serving area is a geographic area containing several local switches that subtend a single access tandem switch. Each LATA contains at least one access tandem area, but some LATAs in Pennsylvania contain more than one. The PUC's order required Worldcom to interconnect at each tandem switch, even if it already had connected at another point within that LATA. The District Court vacated that term of the interconnection agreement as contrary to the Act.

Second, the PUC had required Verizon to permit Worldcom to collocate remote switching modules (RSMs) in Verizon's central offices. RSMs are devices used for interconnection. An RSM also contains switches with the limited capability of so-called line-to-line switching, switching calls between two customers, each of whom is served by

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[1] The District Court also rejected PUC challenges to the Act under the Commerce Clause, U.S. Const. art. I, S 8, cl. 1, and the Tenth Amendment. None of these issues has, however, been raised in the present appeal.

unbundled loops. An RSM can be used to access unbundled loops and to interconnect to them, but it can also switch calls between Worldcom customers. In other words, RSMs are a single piece of equipment that enables the CLEC to perform several functions, including both interconnection and switching. Verizon contended that an RSM was not "necessary" for interconnection and that Verizon could not be required to permit collocation of such equipment. The Magistrate Judge and District Court rejected this argument and affirmed that portion of the interconnection agreement.

Third, the PUC had required Verizon to sell directory publishing services at wholesale rates as a telecommunications service. Directory publishing services include basic listings with customer telephone numbers, as well as additional services such as vanity numbers, bold and foreign listings in the White Pages, and non-listing and non-publication of customers' telephone numbers. Verizon argued that directory publishing services were not telecommunications services under the Act. The Magistrate Judge rejected this argument, but the District Court accepted it and struck down this provision of the agreement.

Fourth, the PUC had established wholesale rates to be charged to Worldcom for resale of telecommunications services. Verizon objected to the rates, but the District Court rejected Verizon's argument and affirmed the PUC-approved rates contained in the agreement.

Fifth, the PUC had established the prices to be charged for unbundled network elements, using what it called TSLRIC, or total service long-run incremental cost, methodology. Worldcom argued that the PUC had not used the required forward-looking TELRIC methodology established by the FCC. The District Court agreed and remanded to the PUC for it to establish new rates using the proper TELRIC methodology.

The PUC and Verizon both timely appealed the decisions of the District Court; the appeals were consolidated.

III. Sovereign Immunity

We first address the PUC's and Commissioners' appeal of the District Court's rejection of their claims of sovereign immunity under the Eleventh Amendment.[2] Our review of a District Court's denial of sovereign immunity is plenary. *See Lavia v. Pennsylvania Dept. of Corr.*, 224 F.3d 190, 194-95 (3d Cir. 2000).

A. Background to the Eleventh Amendment

We begin with an overview of Eleventh Amendment jurisprudence. That amendment has been interpreted to make states generally immune from suit by private parties in federal court. *See Board of Tr. of Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 962 (2001); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Lavia*, 224 F.3d at 195. This immunity extends to state agencies and departments. *See C.H., ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201 (3d Cir. 2000) (*en banc*).

Eleventh Amendment immunity is subject to three exceptions: 1) congressional abrogation, 2) state waiver, and 3) suits against individual state officers for prospective relief to end an ongoing violation of federal law.

First, Congress may, in some limited circumstances, abrogate sovereign immunity and authorize suits against states. If a statute has been passed pursuant to congressional power under § 5 of the Fourteenth Amendment to enforce the provisions of that amendment, Congress can abrogate a state's sovereign immunity. *See Garrett*, 121 S. Ct. at 962;

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[2] We consolidated oral argument on the sovereign immunity issues in this case with the same issues raised in *Bell Atl.-Pennsylvania, Inc. v. Pennsylvania Public Util. Comm'n*, Nos. 00-2619, 00-2620, decided this day. The legal issues and arguments and our resolution of them are the same in both cases.

*College Savings*, 527 U.S. at 670; U.S. Const. amend. XIV, § 5 (1868).[3] Congress may not, however, abrogate state sovereign immunity when a statute is passed pursuant to its Article I powers, such as the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *See Garrett*, 121 S. Ct. 962; *Seminole Tribe*, 517 U.S. at 72-73 (holding that the Eleventh Amendment limits the federal judicial power and Article I cannot be used to circumvent the constitutional limits placed on the courts). The Telecommunications Act of 1996 was clearly a congressional exercise of its Commerce Clause power. Congress did not, and could not, abrogate Eleventh Amendment immunity in providing for federal court review in § 252(e)(6). Abrogation is not implicated here.

Second, a state may waive sovereign immunity by consenting to suit. *See College Savings*, 527 U.S. at 670 (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883)). The waiver by the state must be voluntary and our test for determining voluntariness is a stringent one. *See College Savings*, 527 U.S. at 675 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). The state either must voluntarily invoke our jurisdiction by bringing suit (not the case here) or must make a "'clear declaration' that it intends to submit itself to our jurisdiction." *See College Savings*, 527 U.S. at 676 (citing *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). The decision to waive immunity must be an "altogether voluntary" one, and, as with any other waiver of a constitutional right, there must be an "intentional relinquishment or abandonment of a known right or privilege." *College Savings*, 527 U.S. at 681-82.

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[3] A federal statute does not abrogate Eleventh Amendment immunity where the statute, although purportedly passed pursuant to § 5, is not appropriate § 5 legislation because it goes beyond the scope of what the Fourteenth Amendment itself protects. *See Garrett*, 121 S. Ct. at 962; *id.* at 967-68 (holding that nonconsenting states could not be sued under Title I of the Americans With Disabilities Act, which accorded more protection to disabled persons than did the Equal Protection Clause).

The difficult question we now face is how do we infer waiver from a state's actions. To answer this question, we must turn to the Supreme Court's recent decision in *College Savings*. There, the Court held that a suit against a state agency under the Trademark Remedy Clarification Act, alleging that the state agency had made false and misleading advertising statements, was barred by the Eleventh Amendment. *See College Savings*, 527 U.S. at 691. The Court held that the state's sovereign immunity was not validly abrogated by the Act and not voluntarily waived by the state's mere participation in an activity in interstate commerce, such as providing student loan services and advertising those services. *See id.*

The Court, in rejecting waiver of Eleventh Amendment immunity in *College Savings*, overturned the constructive waiver doctrine formerly established in *Parden v. Terminal R. of Alabama State Docks Dept.*, 377 U.S. 184 (1964). *See College Savings*, 527 U.S. at 680 ("Whatever may remain of our decision in *Parden* is expressly overruled."); *id.* ("We think that the constructive-waiver experiment of Parden was ill conceived, and see no merit in attempting to salvage any remnant of it."). *Parden* involved the operation by a state of a railroad in interstate commerce. In *Parden*, the Court had held that, if the state had notice when it entered a field which was subject to congressional oversight or regulation that it would be subject to suit in federal court, then the state was deemed to have waived immunity and consented to suit. *Parden*, 377 U.S. at 192 (concluding that state, when it began operation of a railroad in interstate commerce, 20 years after the enactment of the Federal Employers' Liability Act, necessarily consented to such suit as was authorized by the Act).

Since *College Savings*, a state's mere participation in a federally regulated activity no longer may be understood as a constructive waiver of state sovereign immunity and consent to suit in federal court. Congress no longer may statutorily coerce a state into relinquishing its sovereign immunity on

threat of the state being excluded from participating in an otherwise lawful and permissible activity. *See College Savings*, 527 U.S. at 687; *see also id.* at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*.").

But the College Savings Court distinguished and left intact conditional types of constructive waiver as previously established in two cases. In *Petty v. Missouri Bridge Comm'n*, 359 U.S. 275, 277-78 (1959), two states entered into an interstate compact, approved by Congress, that contained a sue-or-be-sued clause. The Court held that the states assumed the conditions, such as consent to suit, that Congress attached to the compact by accepting the conditions and acting on the compact containing those conditions. *See id.* at 281-82. In *South Dakota v. Dole*, 483 U.S. 203, 208-09 (1987), the Court upheld a federal law, passed pursuant to the Spending Clause, U.S. Const. art. I, § 8, cl. 1, that conditioned a state's receipt of federal highway funds on the establishment of a minimum drinking age of 21 in the state; the Court found that the condition on the funds was clearly stated and that acceptance of the funds entailed agreement to those conditions.

The College Savings Court described these cases as "fundamentally different" from *Parden*-type forced constructive waivers because both the grant of consent to form an interstate compact and the disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a state is not otherwise entitled to receive, and to which Congress can attach whatever conditions it chooses. *See College Savings*, 527 U.S. at 686-87. A waiver in return for receiving a benefit which a state could not otherwise enjoy is very different from a situation, such as in *College Savings* or *Parden*, where a state's refusal to consent to the condition of being sued would

result in a congressionally imposed sanction, *i.e.*, the exclusion of the state from activities in which it otherwise was legally permitted to engage.

A fair reading of *College Savings* suggests that Congress may, pursuant to its regulatory power under the Commerce Clause, require a state to waive immunity in order to engage in an activity in which the state may not engage absent congressional approval, or in order to receive a benefit to which the state is not entitled absent a grant or gift from Congress. Four of our sister circuits have adopted this understanding of College Savings, recognizing that "gift" or "gratuity" waivers are permissible under a law passed pursuant to Article I powers, provided that Congress made its intent to require a waiver of immunity clear and unambiguous. *See Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 292 (4th Cir.) (recognizing congressional power to impose gift waiver, so long as its intent to do so is clear), *cert. granted in part*, 121 S. Ct. 2548 (2001); *Bellsouth, supra*, 238 F.3d at 645 (5th Cir.) ("[A]fter *College Savings*, Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on waiver of immunity."); *MCI, supra*, 222 F.3d at 339-40 (7th Cir.) (holding that College Savings set boundaries on congressional attempts to obtain waivers from states but that it endorsed certain types of waivers, such as in *Dole* and *Petty*); *id.* at 344 ("We believe that *College Savings* does not alter the principle that states may waive their immunity by accepting a benefit from Congress that has conditions attached to that acceptance."); *MCI Telecomm. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 937 (10th Cir. 2000) (Public Serv. Comm'n of Utah) (reading *College Savings* as permitting constructive waivers that are voluntary,

meaning waivers given in order to obtain a gift or gratuity that would be denied if the state refuses to consent to suit in federal court), *cert. denied*, 121 S. Ct. 1167 (2001).

Congress must be unmistakably clear and unambiguous in stating its intent to condition receipt of the gratuity on the state's consent to waive its sovereign immunity and to be sued in federal court. *See Atascadero State Hosp.*, 473 U.S. at 247. This requirement that Congress speak with a "clear voice" ensures that the states exercise their choice knowingly and voluntarily, cognizant of the consequence (waiver of constitutional immunity) of participating in the permitted activity. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*).

The third exception to the Eleventh Amendment is the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), under which individual state officers can be sued in their individual capacities for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law. In *Young*, the Supreme Court held that the Eleventh Amendment did not prohibit a federal court from enjoining a state attorney general from enforcing an unconstitutional state law. The theory behind *Young* is that a suit to halt the enforcement of a state law in conflict with the federal constitution is an action against the individual officer charged with that enforcement and ceases to be an action against the state to which sovereign immunity extends; the officer is stripped of his official or representative character and becomes subject to the consequences of his individual conduct. *See Young*, 209 U.S. at 159-60; *see also Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 103 (1984) (*Pennhurst II*) (stating that, under the theory of *Young*, an action for prospective relief against the state officer was not an action against the state because the allegation of a violation of federal aw would strip the officer of his official authority). The relief sought must be prospective, declaratory, or injunctive

relief governing an officer's future conduct and cannot be retrospective, such as money damages. *See Pennhurst II*, 465 U.S. at 102-03.

The *Young* doctrine is accepted as necessary to permit federal courts to vindicate federal rights and to hold state officials responsible to the "supreme authority of the United States." *See id.* at 105. The doctrine applies both to violations of the United States Constitution and to violations of federal statutes. *See Balgowan v. New Jersey*, 115 F.3d 214, 218 (3d Cir. 1997) (holding that suit for declaratory relief against state officer under Fair Labor Standards Act is permissible under *Young*); *see also Allegheny County Sanitary Auth. v. U.S.E.P.A.*, 732 F.2d 1167, 1174 (3d Cir. 1984). However, *Young* does not apply if, although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit in fact is against the state. *See Pennhurst II*, 465 U.S. at 101.

Some confusion has arisen as to the scope and application of *Young* as a result of the Supreme Court's recent decision in *Coeur d'Alene*. There, an Indian tribe brought suit against Idaho state officers arguing that, under federal law, the Tribe should hold title to the banks, bed, and submerged lands of Lake Coeur d'Alene and the various navigable rivers and streams forming part of its waterway. *See Coeur d'Alene*, 521 U.S. at 264. A five-Justice majority concluded that Young did not permit the action because the Tribe's suit, although brought against individual officers for prospective relief from an ongoing violation of federal law, was the functional equivalent of a quiet title action against the state, which, if successful, would divest the state of title and sovereign control over the waters and submerged lands. *See id.* at 283. Submerged land beneath navigable waters has a unique status in law and is infused with a public trust; state ownership of such lands has been "considered an essential attribute of sovereignty." *See id.* (citations and internal quotation marks omitted); *id.* at 287-88 (emphasizing the ties

between the waters and submerged lands and the state's own dignity and sovereignty and the severance and diminishment of that sovereignty were prospective relief to be granted); *id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment) ("Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State.").

The principal opinion in *Coeur d'Alene*, authored by Justice Kennedy, garnered five votes in its determination that the Tribe's action was equivalent to a quiet title action against the state itself and was barred by the Eleventh Amendment. Justice Kennedy's opinion also suggested, however, that *Young* is not applicable to every case in which prospective relief is sought against an individual officer from an ongoing violation of federal law. *See* 521 U.S. at 270 (describing that view as adhering to an "empty formalism" and undermining the real limits imposed by the Eleventh Amendment). Rather, Justice Kennedy suggested that *Young* applies primarily in two instances: where there is no state forum available to vindicate federal rights, see id., and where the case calls for the interpretation of federal law. *See id.* at 274. Justice Kennedy urged that there always be a careful balancing and accommodation of federal and broad state interests when determining whether Young applies, applying a case-by-case balancing approach. *See id.* at 278.

The portion of Justice Kennedy's opinion adopting this narrowed view of *Young* was joined only by the Chief Justice. In a separate opinion, Justice O'Connor, joined by Justices Scalia and Thomas, sharply criticized the replacement of a "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of factors." *Id.* at 296 (O'Connor, J., concurring in part and concurring in the

judgment); *see id.* at 291 (criticizing the principal opinion as unnecessarily narrowing *Young* without warrant); *id.* at 296-97 ("I would not narrow our *Young* doctrine."); *see also id.* at 297-98 (Souter, J., dissenting) (stating that Justice O'Connor had rejected the call for case-by-case balancing in applying *Young* and expressing "great satisfaction" that this view is the controlling one).

Justice Kennedy's opinion in *Coeur d'Alene* cannot be read to establish the controlling standard for *Young*. Seven Justices rejected such a balancing and agreed that *Young* generally should apply when an action against a state officer alleges an ongoing violation of federal law and seeks prospective relief. *See id.* at 296 (O'Connor, J., joined by Scalia and Thomas, JJ., *concurring in part and concurring in the judgment*); *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). The Fifth Circuit has held that, because a majority of the Supreme Court would adhere to the more traditional application of *Young*, the Fifth Circuit would also continue to do so. *See Bellsouth*, 238 F.3d at 648-49 (quoting *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1039 (5th Cir. 1998)). We agree and similarly hold that *Young* continues to permit actions against state officers for prospective relief from ongoing violations of federal law; no case-by-case balancing is necessary or proper.

*Coeur d'Alene* did carve out one narrow exception to *Young*: An action cannot be maintained under Young in those unique and special circumstances in which the suit against the state officer affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state. One example of such special, essential, or fundamental sovereignty is a state's title, control, possession, and ownership of water and land, which is equivalent to its control over funds of the state treasury. *See Coeur d'Alene*, 521 U.S. at 287; *id.* at 296-97 (O'Connor, J., concurring in part and concurring in the judgment). This exception is best

understood as an application of the general rule that *Young* does not permit actions that, although nominally against state officials, in reality are against the state itself. *See Pennhurst II*, 465 U.S. at 102.

In addition, the Court in Seminole Tribe has carved out a second exception to *Young*. *Young* will not apply where Congress has created a detailed remedial scheme for the enforcement of a federal statutory right against a state. *See Seminole Tribe*, 517 U.S. at 74. The statute at issue in Seminole Tribe was the Indian Gaming Regulation Act (IGRA), under which Congress established a limited set of remedies and detailed, elaborate procedures for obtaining those remedies. Pursuant to IGRA, the state was under an obligation to negotiate with a tribe in good faith and if a court found that the tribe had failed to do so, the sole remedy was for a court to order the state and the tribe to conclude a compact within 60 days. See id. If the parties did not complete the compact within that time, the sole sanction was that each party was to present a proposed compact to a mediator, who would choose the compact best embodying federal law. *See id.* If the state still failed to comply, the tribe was to notify the Secretary of the Interior, who would prescribe regulations. *See id.* at 74-75. This limited remedy contrasted with the full panoply of prospective judicial remedies available in an action against individual officers under *Young*, including contempt sanctions for violation of an injunction. *See id.* at 75. Where, as in IGRA, Congress has created such a detailed and limited remedial scheme in the statute itself, a federal court cannot obtain jurisdiction through *Young* over an action against state officers which seeks a remedy beyond that which Congress itself has made available against the state under federal law.

B. The Eleventh Amendment and S 252(e)(6)

With this overview of the Eleventh Amendment in mind, we turn to the question whether § 252(e)(6), providing for

federal court review of an interconnection agreement approved by a state utility commission, violates the PUC's and the Commissioners' Eleventh Amendment sovereign immunity. We are not the first court of appeals to address this question. The Fifth, Seventh, and Tenth Circuits have all concluded that § 252(e)(6) does not violate the Eleventh Amendment, both because the state utility commissions knowingly and voluntarily waived immunity by accepting the congressionally bestowed gratuity of participating in the process of approving interconnection agreements, fully aware that they would be subject to suit under § 252(e)(6), and because *Young* permits suits for prospective relief against individual commissioners. *See Bellsouth, supra*, 238 F.3d 636 (5th Cir.); *MCI, supra*, 222 F.3d 323 (7th Cir.); *Public Serv. Comm'n, supra*, 216 F.3d 929 (10th Cir.). The Sixth Circuit also held that a S 252(e)(6) action was not barred, relying solely on *Young*. *See Michigan Bell Tel. v. Climax Tel. Co.*, 202 F.3d 862 (6th Cir.), *cert. denied*, 121 S. Ct. 54 (2000). Only the Fourth Circuit, over a dissent, has reached a different conclusion, holding that actions against state commissions and commissioners are barred by the Eleventh Amendment. *See Bell Atl. Md.*, 240 F.3d 279 (4th Cir.); *see also Bellsouth Telecomm., Inc. v. North Carolina Util. Comm'n*, 240 F.3d 270 (4th Cir. 2001) (same result in companion case).[4]

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[4] The Supreme Court has granted certiorari on both parts of the sovereign immunity question in *Bell Atl. Md.* and also in a case from the Seventh Circuit, *Mathias v. Worldcom Tech., Inc.*, 121 S. Ct. 1224 (2001). The cases have been consolidated for oral argument. We have determined, however, that we should resolve the legal issues before us and not await the Supreme Court's decision on sovereign immunity. The reason we do so is consistent with the purpose of the 1996 Act—to establish competition in local telephone service as quickly and expeditiously as possible. We cannot reach the merits of our appeals until we have resolved the issue of sovereign immunity. If we do resolve that issue, even if our conclusion is ultimately overturned, our decision on the merits will

1. Waiver

We will first consider whether the Telecommunications Act of 1996, by taking control of local telephone companies away from the states and then giving back to them the option of participating in local telecommunications regulation, has established the type of gratuity or gift waiver of Eleventh Amendment immunity that the College Savings Court recognized as permitted under Commerce Clause powers. We must answer two questions: 1) whether the authority to participate in the regulatory scheme is in fact a gift or gratuity to which Congress may attach as a condition the state's agreement to waive sovereign immunity and be sued in federal court and 2) whether Congress in the statute made clear, explicit, and unambiguous its intent that state utility commissions participating in the regulatory process would subject themselves to suit in federal court, so that the states can be said to have knowingly and voluntarily waived sovereign immunity by participating in that process.

(a)

We conclude that under the Act the authority to regulate local telecommunications is a gratuity to which Congress may attach conditions, including a waiver of immunity to suit in federal court. Thus, the submission to suit in federal court, provided for in § 252(e)(6), is valid as a waiver, conditioned on the acceptance of a gratuity or gift, as permitted by *College Savings*.

We find a gratuity because, with the 1996 Act, Congress federalized the regulation of competition for local telecommunications service. The Act preempted the regulation of interconnection agreements and of the terms on which a CLEC can provide competitive local service. Local telephone

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still assist the parties in their efforts to establish interconnection agreements. For that reason, and because we have persuasive precedent to follow, we have decided to move forward.

service had previously been a monopoly service within the exclusive regulatory province of the states. *See Iowa Utils. I*, 525 U.S. at 370. The 1996 Act fundamentally restructured local service by requiring competition and establishing the mechanisms by which competing carriers may enter the market. *See id.* The Act, passed pursuant to Congress's power over interstate commerce (which is plenary, *see Oregon Waste Sys., Inc. v. Department of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994)), validly preempted state regulation over competition to provide local telecommunications service. *See Iowa Utils. I*, 525 U.S. at 378 n.6 (stating that Congress "unquestionably" took the regulation of local telecommunications competition away from the states); *see also Bellsouth*, 238 F.3d at 646; *MCI*, 222 F.3d at 343; *Public Serv. Comm'n*, 216 F.3d at 938.

Congress could have made that preemption complete. It could have entirely eliminated any state role in regulating local competition and in conducting arbitration, review and approval of interconnection agreements, and it could have reserved to the FCC all such review and regulation. *See Bellsouth*, 238 F.3d at 646; *MCI*, 222 F.3d at 342; *Bell Atl. Md.*, 240 F.3d at 316 (King, J., dissenting); *see also FERC v. Mississippi*, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to preempt the States entirely in the regulation of private utilities."). Congress instead preserved a role for state utility commissions in the federal regulatory scheme, giving them back some regulatory power by allowing them the first opportunity to conduct arbitrations and to approve or reject interconnection agreements. *See* 47 U.S.C. § 252(b)(1); 47 U.S.C. § 252(e)(1), (e)(2), (e)(4).

Because Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity. The state commission's authority to regulate comes from § 252(b) and (e), not from its own sovereign

authority. *See MCI*, 222 F.3d at 343. Regulating local telecommunications competition under the 1996 Act no longer is, in the words of *College Savings*, an "otherwise lawful" or "otherwise permissible" activity for a state. Rather, it is an activity in which states and state commissions are not entitled to engage except by the express leave of Congress.

Indeed, the "states are not merely acting in an area regulated by Congress; they are now voluntarily regulating on behalf of Congress." *MCI*, 222 F.3d at 343; *see Bellsouth*, 238 F.3d at 647 (stating that the state "accepted Congress's offer under the 1996 Act to delegate federal authority to the state commission"); *Public Serv. Comm'n*, 216 F.3d at 938 (stating that the Act "invites states to participate in the federal government's regulation of local telephone service"). Because this opportunity for the states to exercise federal power is a gratuity from Congress, Congress may then attach to that grant of regulatory power any conditions it chooses. The condition which it did attach was the submission to suit in federal court. Thus, when a state accepts that grant of regulatory power, it does so under the condition that it be subject to suit in federal court. *See MCI*, 222 F.3d at 344 n.10 ("By accepting the grant of regulatory power offered by Congress, and by allowing the state commission to exercise that power, [the states] cannot contend now that they are not bound by the conditions attached to that grant of power.").

The PUC contends, however, that the power to regulate local telephone service is not a congressional gratuity but a primary aspect of core state sovereignty, a power the states have exercised exclusively for decades. This argument ignores the fundamental restructuring of telecommunications markets worked by the 1996 Act, *see Iowa Utils. I*, 525 U.S. at 370. Through the Act's restructuring, the federal government has "unquestionably" taken the regulation of local telecommunications competition away from the states. *See id.* at 378 n.6. Whatever the power of the states in the area of local telephone regulation prior to 1996, that power did not

survive passage of the Act. State commissions now exercise power over local competition only pursuant to § 252(e) and only to the extent and in the manner provided by Congress.

The fact that the PUC was required under pre-1996 state law to regulate local telephone service and that the pre-1996 law has not been repealed by the Pennsylvania legislature does not mean that the present participation by the PUC in regulation is not voluntary. The relationship between the state and the state utility commission under state law is irrelevant to the Eleventh Amendment analysis. If the state's participation in the federal scheme is voluntary, then its delegated commission's participation is also voluntary. And, as a result of the federal preemption, resulting from the Act, the decision by a state to regulate competition in the provision of local telecommunications service is a voluntary one. When, therefore, the state directs the state commission to participate in regulation under the Act, the commission's participation is also voluntary.

Moreover, a state's participation in telecommunications regulation is not mandatory. If a state commission declines or fails to participate in arbitration or review of interconnection agreements, responsibility for regulation falls to the FCC. *See* 47 C.F.R. § 51.803-807. There is no requirement or obligation in federal law that a state participate in this regulation.[5] A state or state commission's decision not to act is not subject to review. *See* 47 U.S.C. § 252(e)(6) (providing that an aggrieved party's only remedy if the state commission fails to act is to pursue its challenge to the agreement with the FCC). The state commission is "free to accept or reject such participation as a gratuity without abstaining from any lawful

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[5] This voluntariness is critical. Because the state commissions are given a choice whether to participate in federal regulation, the Act cannot be said impermissibly to "commandeer" state regulatory agencies to enforce federal law. *See MCI*, 222 F.3d at 343 (citing *Printz v. United States*, 521 U.S. 898, 935 (1997)).

activity within its power." *See Bellsouth*, 238 F.3d at 647. A state or state commission wishing to preserve its Eleventh Amendment immunity may simply decline the invitation to regulate local competition on behalf of the federal government and allow that power to return to the FCC. Indeed, the state commission in Virginia has declined to resolve petitions to interpret and enforce interconnection agreements and the FCC has stepped in to exercise regulatory responsibility in Virginia. *See* FCC Order. In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(3)(5) of the 1996 Act, CC Docket No. 00-52 (June 14, 2000).

If the Commonwealth of Pennsylvania continues to direct the PUC to perform these regulatory functions, however, this decision by the Commonwealth, as delegated to the PUC, is a voluntary decision. *See MCI*, 222 F.3d at 344 n.10.

(b)

Even though we have concluded that the right to participate in the regulation of local telecommunications competition is a gratuity or benefit bestowed on the states by Congress, we must still determine whether Congress was unmistakably explicit, clear, and unambiguous in § 252(e) in providing that a state utility commission's determination, approving interconnection agreements affecting local telecommunications competition, would be subject to review in federal court.

In considering whether § 252(e) is explicit, clear, and unambiguous, we look to its language and to the language of the Act as a whole. The regulatory process begins with negotiations by an ILEC and a CLEC to form an interconnection agreement. The Act provides that such an agreement, whether adopted through negotiation or arbitration, is submitted to the state utility commission, which reviews the agreement for consistency with the Act and the public interest and which approves or rejects the agreement.

*See* 47 U.S.C. S 252(e)(1). The commission is also the first body to which carriers turn for arbitration if negotiations are unsuccessful or if issues remain unresolved. *See* 47 U.S.C. § 2 252(b)(1). The Act then provides that, when the state commission has made a determination on the agreement, "any party aggrieved by such determination may bring an action in an appropriate Federal district court," challenging whether the agreement meets the requirements of §§ 22 251 and 252. *See* 47 U.S.C. § 2252(e)(6). In other words, § 252(e)(6) specifically provides for "actions" in federal court brought by "aggrieved" parties to review "agreements" and "statements" approved by state utility commissions. Moreover, § 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." *See* 47 U.S.C. § 252(e)(4). Federal jurisdiction for the review of commission decisions on interconnection agreements is exclusive.

Consequently, a state commission that decides to participate in this statutory scheme is on notice from the outset that it will be subject to suit, brought only in federal court, by any party aggrieved by its decision. *See MCI*, 222 F.3d at 337 (stating that §§ 252(e)(4) and 252(e)(6), read together, indicate "that Congress envisioned suits reviewing 'actions' by state commissions" and that "Congress intended that such suits be brought exclusively in federal court."). The statutory language places the state utility commission on notice that, by choosing to act on an interconnection agreement and to make a decision as to its legality, it submits itself to the jurisdiction of the federal courts.

We agree with our sister circuits that this language constitutes a sufficiently clear congressional statement that a state will and must waive its sovereign immunity when it acts to regulate local competition agreements. *See Bellsouth*, 238 F.3d at 646; *MCI*, 222 F.3d at 341 ("[T]he 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory

scheme entails a waiver of immunity from suit in federal court."); *Public Serv. Comm'n*, 216 F.3d at 938 ("[Section] 252 puts Utah on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252."); *see also Bell Atl. Md.*, 240 F.3d at 314 (King, J., dissenting) (arguing that the provisions of the Act "clearly show Congress's intent to subject participating states to suits in federal court"); *but see Bell Atl. Md.*, 240 F.3d at 292 (holding that Congress did not clearly manifest an intent to condition state commissions' participation in the regulatory scheme on a waiver of sovereign immunity).

Moreover, a state commission is not obligated to waive sovereign immunity by participating in the regulatory process. The Act clearly provides that, if a state does not respond to a request to mediate or to arbitrate an interconnection agreement, the FCC is to assume that responsibility. For that reason, state participation in the regulation of local telecommunications competition is a choice, not a mandate.

It is true that the Act does not include magic words such as "waiver" or "immunity" or "suit." The Act became effective in 1996, prior to the Supreme Court's decision in *Seminole Tribe* that Congress may not abrogate Eleventh Amendment immunity under the Commerce Clause and prior to the decision in *College Savings* overturning the constructive waiver doctrine of *Parden*. Perhaps, were Congress drafting the statute in 2001 with *Seminole Tribe* and *College Savings* in the mix, it would have been more explicit than it was. We believe, however, that the language that Congress did use is sufficiently clear to establish that a state commission's decision will be subject to review in an action brought in federal court by an aggrieved party and sufficiently clear that the commission may be made a party to that federal court action.

The argument is made in *Bell Atl. Md.* that the statute merely puts states on notice that their decisions will be subject to judicial review in federal court but that"it is a leap of logic to infer from this consent to federal-court review a consent by a State commission itself to be made a party to that federal review." 240 F.3d at 293; id. at 290. However, as the dissent in *Bell Atl. Md.* aptly states, consent to federal court review of a decision "necessarily entails" being made a party to the action. There is in fact no "leap of logic" from consent by a state commission to having its decision reviewed to consent by a state commission to being a party to that review. *See id.* at 314 (King, J., dissenting). We agree that "by allowing State commissions to substitute as regulators for the FCC, Congress obviously intended that State commissions, just like the FCC, be made parties to federal court actions challenging their decisions." *Id.* at 315 (King, J., dissenting); *see MCI*, 222 F.3d at 337 (holding that the language of § 252(e) shows Congress's intent that state commissions be parties to the federal-court suits reviewing their decisions in the same way that the FCC is a party to the federal-court suits reviewing its actions).

We hold therefore, along with the Fifth, Seventh, and Tenth Circuits, that the PUC is subject to suit in federal court under the 1996 Act because the PUC knowingly waived its Eleventh Amendment immunity by voluntarily accepting the congressional gift or gratuity of the power to regulate local telecommunications competition under the Act. The District Court had jurisdiction over the PUC and we affirm the court's rejection of the PUC's Eleventh Amendment arguments.

2. *Ex Parte Young*

In the alternative, we hold that the action against the individual PUC Commissioners is not barred by the Eleventh Amendment because the case presents, in the Sixth Circuit's terms, "a straightforward *Ex Parte Young* case." *Michigan Bell*, 202 F.3d at 867. The Fifth, Seventh, and Tenth Circuit

have all agreed. *See Bellsouth*, 238 F.3d at 647 (5th Cir.) (stating that the Act presents a straightforward application of *Young*); *MCI*, 222 F.3d at 345 (7th Cir.) (holding that Eleventh Amendment does not bar telecommunications carriers from pursuing injunctive relief against individual members of state utility commissions); *Public Serv. Comm'n*, 216 F.3d at 939 (10th Cir.) (holding that telephone carrier could proceed against individual Commissioners); see also *Bell Atl. Md.*, 240 F.3d at 317 (King, J., dissenting) (agreeing with other circuits that suit under § 252(e)(6) was straightforward Young case); but *see Bell Atl. Md.*, 240 F.3d at 294-95 (4th Cir.) (holding that *Young* did not permit suit against individual Commissioners).

Application of *Young* here is, indeed, straightforward. As discussed in Part III A *supra*, we continue to view *Young* as generally applicable any time a plaintiff seeks prospective relief against individual state officers from an ongoing violation of federal law. *See Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment); *see also Bellsouth*, 238 F.3d at 648-49.

Worldcom, AT&T, and Verizon all allege that various terms, rates, and conditions contained in the interconnection agreement established and approved by the PUC are inconsistent with and violative of the requirements of §§ 251 and 252. Those terms and conditions govern and will continue to govern the current and future relations among the telephone carriers and the establishment of local competition in Pennsylvania by the parties to the agreement. The PUC (acting through the individual commissioners) is charged not only with establishing those original terms but also with overseeing the implementation and enforcement of the interconnection agreement against the parties.

If the terms of the approved interconnection agreement do violate the Act, that violation constitutes an ongoing violation of federal law. The Commissioners individually are parties to

the suit. The carriers seek prospective relief in a declaration that certain provisions of the approved interconnection agreement violate the Act and in an injunction prohibiting enforcement of the agreement and requiring the PUC to establish different, more appropriate rates, terms, and conditions. This is the paradigmatic *Young* framework. *See Bellsouth*, 238 F.3d at 647; *MCI*, 222 F.3d at 345; *Public Serv. Comm'n*, 216 F.3d at 939; *Michigan Bell*, 202 F.3d at 867.

The Fourth Circuit is the only court of appeals to reach a different conclusion on the application of *Young* to the 1996 Act. The majority there relied on Justice Kennedy's case-by-case balancing theory, set out by him in *Coeur d'Alene*, by which the federal interests served by permitting the suit against the Commissioners are balanced against the important values of state sovereignty. *See Bell Atl. Md.*, 240 F.3d at 295. The Fourth Circuit concluded that the federal interest in federal review could not overcome the "affront to the sovereignty" of the state in being brought before a federal court to defend a decision made when acting within the scope of its regulatory authority. *See id.* at 295, 298. As stated in Part III A, however, we have rejected the use of such a balancing approach to *Young*. We therefore decline to follow the decision in *Bell Atl. Md.*

Moreover, we conclude that neither of the two recognized exceptions to *Young* bars the instant action. First, the "special sovereignty interests" exception, acknowledged by the majority of justices in *Coeur d'Alene*, is not implicated. The ability of a state to make and carry out its regulatory decisions, which would be interrupted by a federal court injunction and declaration that the decision of the PUC Commissioners violated federal law, cannot be viewed as a core or fundamental matter of state sovereignty comparable to the ability of a state to maintain ownership of and title to its submerged lands. *See MCI*, 222 F.3d at 348. Any sovereign interest that the Commonwealth might have in regulating

local telephone competition exists solely by virtue of the role that Congress bestowed upon the states in § 252(e); the state interest in regulating in this area no longer derives from its general sovereign powers. *See id.* Thus, an action against the individual Commissioners no longer affects these general sovereign powers.

Second, the *Seminole Tribe* exception for a detailed and limited remedial scheme is inapplicable. An aggrieved party "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements" of the Act. *See* 47 U.S.C. § 252(e)(6). The Act places no restrictions on the scope of the court's review or on the remedies it may impose. It places no restrictions on the form and nature of prospective relief that an aggrieved party may obtain. The relief available in an action under § 252(e)(6) is precisely the relief that would be available through a Young action—the full panoply of declaratory and injunctive remedies. *See Bell Atl. Md.*, 240 F.3d at 318 (King, J., dissenting) (quoting *Bell-Atl.-Delaware, Inc. v. Global Naps South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999)).

We hold, consistent with the Fifth, Sixth, Seventh, and Tenth Circuits, that this action may go forward against the individual PUC Commissioners under *Ex Parte Young* because the carriers seek prospective relief against the individual Commissioners to stop an ongoing violation of federal law. We will affirm the District Court on this alternative ground.

## IV. Verizon and PUC Appeals of the Merits

The District Court addressed and resolved several challenges, raised by Worldcom (supported by intervenor AT&T) and by Verizon, to various terms, rates, and conditions contained in the Worldcom/Verizon interconnection agreement. Five such merits issues are before us on separate, consolidated appeals by the PUC and Verizon.

A. Standard of Review

Before considering the merits of these issues, we must determine our standard of review. The District Court resolved the telecommunications challenges on summary judgment and our review of the District Court is plenary. *See Ideal Dairy Farms, Inc. v. John LaBatt, Inc.*, 90 F.3d 737, 743 (3d Cir. 1996). The more difficult question is the proper standard for reviewing the PUC's determinations as established in arbitration and contained in the approved interconnection agreement. Section 252(e)(6) provides for judicial review and a determination whether the approved agreement "meets the requirements" of the Act, *see* 47 U.S.C. § 252(e)(6), but does not prescribe the standard for that review. The District Court reviewed the PUC's interpretations of federal law de novo and its factual determinations under the arbitrary and capricious standard.

The PUC argues that its interpretations of federal law contained in the interconnection agreement are entitled to deference under *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), pursuant to which the construction of a federal statute by a federal agency is accorded deference by reviewing courts when there has been an explicit or implicit delegation of authority to an agency to fill a gap in the statute and the agency interpretation is a reasonable one. *Chevron* deference is warranted when the agency was given the power to make rules carrying the force of law and when the interpretation at issue was promulgated in the exercise of that authority. *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Delegation may be shown by the grant to an agency of power to engage in adjudication or notice-and-comment rulemaking. *See id.* at 2172.

Generally, however, such deference is accorded to the interpretations of federal statutes by federal administrative agencies, not to interpretations by state agencies. *See GTE*

*South*, 199 F.3d at 745 (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997)). The PUC argues for an exception to this general rule, given the unique structure of the Act by which Congress delegated federal regulatory power to state utility commissions and the commissions exercise federal power that the FCC otherwise would exercise.

The PUC argues that its interpretations of federal law, made in reviewing and approving interconnection agreements, should be entitled to the same deference as would the FCC's interpretations if the FCC were primarily responsible for reviewing the agreements. Arguably, the state commissions do possess the same institutional competence as the FCC to make such decisions in the area of telecommunications law. *See* Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L. Rev. 1, 22-23 (1999). If the state commissions enjoy the confidence of Congress, they (and their interpretations of federal law) should enjoy similar confidence from the federal courts. *See id.* at 36. We reject this argument, however, and instead join the Ninth and Fourth Circuits in holding that a state utility commission's interpretations of the Act are reviewed *de novo*, not under *Chevron*, because the state commissions are not federal agencies to which deference is due. *See MCI v. U.S. West*, 204 F.3d at 1266; *GTE South*, 199 F.3d at 745.

Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking. *See Mead*, 121 § Ct. at 2171. The power to promulgate binding regulations to implement the requirements of the Act and to fill statutory gaps was granted to the FCC, *see* 47 U.S.C. § 251(d)(1), and those regulations are entitled to deference. *See Mead*, 121 § Ct. at 2172 (stating that a good indicator of delegation meriting *Chevron* deference is an express congressional authorization for an agency to engage in the rulemaking process); *see also Iowa*

*Utils. II*, 219 F.3d at 748-49 (according *Chevron* deference to FCC rate regulations promulgated pursuant to § 251(d)(1)). State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

In fact, deference to the state commissions would often be impossible, given the explicit delegation of rulemaking authority to the FCC in § 251(d)(1). The interconnection agreement must comply with the Act and with FCC regulations; if the approved agreement, containing the state commission's interpretations of the law, conflicts with the legal interpretations in the FCC regulations, the FCC interpretation must control under the Supremacy Clause and under the plain language of the Act. If, therefore, the PUC's interpretation conflicts with that of the FCC, the PUC's determination must be struck down.

Our conclusion not to accord deference to a state commission's interpretation of the Act is enforced by the Supreme Court's recent decision in *Mead* which suggests that not every formal agency act involving interpretation of a federal statute is entitled to deference. *See Mead*, 121 § Ct. at 2173 (holding that classification rulings by Customs Service not entitled to *Chevron* deference).

We will, therefore, review any PUC legal interpretations contained in the arbitration and interconnection agreement *de novo*. We will review factual findings under a substantial evidence standard. *See MCI v. U.S. West*, 204 F.3d at 1267; *GTE South*, 199 F.3d at 745. Under the substantial evidence test, we must uphold a decision that has "substantial support in the record as a whole." *See GTE South*, 199 F.3d at 746 (citations omitted).

B. Terms of the Interconnection Agreement

1. Interconnection in Access Tandem Serving Areas

The first merits issue we must consider is the PUC's requirement that Worldcom interconnect in each access tandem serving area, even when there is more than one access tandem area within a single LATA. It is Worldcom's position that it need interconnect only once within each LATA.

The Act provides that a CLEC must be permitted to interconnect "at any technically feasible point within the carrier's network." 47 U.S.C. S 251(c)(2)(B). An ILEC that denies interconnection at a particular point must prove that interconnection at that point is not technically feasible. *See* 47 C.F.R. S 51.305(e). Generally, these provisions have been interpreted to permit a CLEC to have access at any point on the incumbent network where connection is technically feasible. *See, e.g., U.S. West Communications v. AT&T Communications of the Pac. Northwest, Inc.*, 31 F. Supp. 2d 839, 852 (D. Or. 1998) (*AT&T-Pac*).

The instant case presents a twist on the usual situation. Verizon, as ILEC, is not attempting to deny Worldcom, as CLEC, access to the network at a particular point or points, nor is Verizon attempting to require that Worldcom interconnect at another point than the one at which Worldcom chooses to interconnect. Rather, Verizon wants Worldcom to take access at several additional points in the network, to interconnect at multiple points within the LATA, even if Worldcom does not want to do so. The PUC and Verizon contend that, because the Act and the FCC regulations do not specify whether a CLEC may be required to interconnect at additional points or how many points of interconnection a CLEC may be required to have, the issue is left to the PUC's discretion.

To the degree that a state commission may have discretion in determining whether there will be one or more

interconnection points within a LATA, the commission, in exercising that discretion, must keep in mind whether the cost of interconnecting at multiple points will be prohibitive, creating a bar to competition in the local service area. *See AT&T-Pac.*, 31 F. Supp. 2d at 852. If only one interconnection is necessary, the requirement by the commission that there be additional connections at an unnecessary cost to the CLEC, would be inconsistent with the policy behind the Act.

Moreover, the fact that § 251(c)(2) permits the CLEC to choose the points in the network at which to interconnect suggests that the Act provides for a balanced resolution in the determination of interconnection points: While the ILEC cannot be required to allow interconnection at technically unfeasible points, similarly the CLEC cannot be required to interconnect at points where it has not requested to do so. If we accept this proposition, the PUC and Verizon cannot require Worldcom to interconnect at any point in the network at which Worldcom does not wish to interconnect.

The decision where to interconnect and where not to interconnect must be left to Worldcom, subject only to concerns of technical feasibility. Verizon has not presented evidence that it is not technically feasible for Worldcom to interconnect at only one point within a LATA. Nor has Verizon shown that it is technically necessary for Worldcom to interconnect at each access tandem serving area. The PUC's requirement that Worldcom interconnect at these additional points is not consistent with the Act. We will affirm the District Court's decision, rejecting the PUC's interconnection requirements. To the extent, however, that Worldcom's decision on interconnection points may prove more expensive to Verizon, the PUC should consider shifting costs to Worldcom. *See* 11 F.C.C.R. 15499 P 209 (1996).

2. Remote Switching Modules

The PUC determined that Worldcom would be permitted to collocate RSMs in Verizon's offices. The District Court

affirmed this portion of the interconnection agreement. This ruling was consistent with the original interpretation of the Act by the FCC. The Act provides that CLECs are permitted to collocate equipment "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). At the outset, the FCC interpreted "necessary" to mean not indispensable, but "used or useful" for interconnection, regardless whether other equipment could be used to perform the same functions. *See* Local Competition Order ¶ 579. The FCC found that this definition was most consistent with the pro-competitive purposes of the Act, as it permitted CLECs to interconnect with greater efficiency and at less cost. *Id.* The FCC further found that this definition applied regardless whether the equipment contained other functions, such as switching. *See* In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 F.C.C.R. 4761P 28 (1999) (Wireline Services Order); *see also* 47 C.F.R. § 51.323(c) (providing that ILECs may not place any limitations on the ability of CLECs to use all the features, functions, and capability of collocated equipment, including switching and routing features). An ILEC objecting to collocation of a piece of equipment was required to prove "that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection." 47 C.F.R. § 51.323(b). The ILEC also had to show that there were technical or space limitations proscribing collocation. 47 U.S.C. § 251(c)(6).

The D.C. Circuit, however, vacated P 28 of the Wireline Services Order and required the FCC to give a"better explanation" for the requirement that a CLEC be permitted to collocate equipment beyond that which is "necessary, required, or indispensable" to interconnection. *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000). The court held that the FCC's interpretation of "necessary" was too broad, particularly in that it would require collocation of any

and all equipment that is used for interconnection, without regard to whether such equipment unnecessarily included other features, such as switching. *Id.* The court rejected the FCC's consideration of cost savings and efficiency in broadening the meaning of "necessary," holding that such considerations had been rejected by the Supreme Court. *Id.* at 424 (citing *Iowa Utils. I*, 525 U.S. at 390).

The FCC has now reissued the collocation rules in the Collocation Remand Order, to take effect September 19, 2001. In the new Order, the FCC has declared that it will allow collocation of "dramatically smaller," "innovative equipment," including "remote switching modules, which are small switches that are used in conjunction with host switches located in different premises." Collocation Remand Order at PP 47 & n.133, 48. We conclude that under this new Order the PUC's ruling allowing collocation of RSMs was proper.

Moreover, both the Fourth and the Ninth Circuits have held that RSMs are used for interconnection and can be a necessary piece of equipment that an ILEC may be required to collocate. *See U.S. West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1056 (9th Cir. 2000); *AT&T-Virginia, Inc. v. Bell Atl.-Virginia, Inc.*, 197 F.3d 663, 669 (4th Cir. 1999); *see also MCI v. U.S. West*, 204 F.3d at 1268-69 (holding, in action brought by ILEC, that provision of agreement requiring ILEC to permit collocation of remote switching units was not proscribed by the Act and was valid); *AT&T-Pac.*, 31 F. Supp. 2d at 854 (upholding state utility commission decision requiring collocation of remote switching unit).

In choosing the equipment to be used for interconnection, Worldcom cannot be required to strip down its network to its bare essentials and to use equipment that performs only a single function, resulting in a less efficient and cost-effective network and, presumably, in higher consumer prices. Verizon's interpretation—that equipment is not necessary for

interconnection merely because it can perform other functions or because some other equipment could be used instead—is incompatible with the reissued Collocation Remand Order and with the policy behind the Act. We will therefore affirm the District Court's decision on collocation of RSMs.

3. Wholesale Rates

Verizon argues that the District Court erred in approving the wholesale rates to be charged to Worldcom for services to be resold under § 251(c)(4)(A). We agree with Verizon and will reverse the District Court's decision on this point.

The Act requires ILECs to "offer for resale at wholesale rates any telecommunications service that the [incumbent] carrier provides at retail to subscribers who are not telecommunications carriers." *See* 47 U.S.C. § 251(c)(4)(A). Wholesale rates are to be determined based on retail rates charged to subscribers, excluding "the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." *See* 47 U.S.C. § 252(d)(3) (emphasis added). The FCC interpreted the pricing standard to be the retail rate, less "avoided retail costs," *see* 47 C.F.R.S 51.607; avoided retails costs are "those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." *See* 47 C.F.R.S 51.609(b) (emphasis added). This is the standard that the PUC applied in setting the rates contained in the interconnection agreement.

The "reasonably can be avoided" standard was struck down by the Eighth Circuit as contrary to the Act. *See Iowa Utils. II*, 219 F.3d at 755-56.[6] The court determined that the word "will" indicated certainty or actuality, meaning the

[6] Certiorari was not granted on this point. *See Iowa Utils. II*, 121 S.Ct. 878 (2001) (granting certiorari on issues). That aspect of the Eighth Circuit's decision is final.

statute excluded from the wholesale rates only those costs certainly and actually avoided in providing services to a CLEC for resale. *See id.* at 755. The Act recognizes that an ILEC will continue to provide its own retail telephone services to consumers and will continue to incur the general costs of providing retail services. *See id.*

The "reasonably can be avoided" standard would exclude from the wholesale rates all costs that could be associated with all provision of retail telephone services to all retail customers, regardless whether the ILEC is avoiding such costs in its sales to the CLEC. A standard based on "actually avoided" costs should, however, focus on the costs avoided in sales made to the CLEC, while recognizing that the ILEC will continue other retail sales. *See id.*

We agree with the Eighth Circuit that the wholesale rates must be based on the costs actually avoided by Verizon in its wholesale sales to Worldcom or to any other CLEC. A wholesale rate such as the one set by the PUC, based on costs that could be but were not actually avoided, is inconsistent with the language of the Act and cannot stand.

We conclude that the PUC erred in setting the wholesale rates for services sold to Worldcom for resale. We will remand this issue to the District Court with orders to remand to the PUC for a new determination of wholesale rates, applying whatever new rate standard the FCC promulgates on remand from *Iowa Utils. II.*[7]

4. Directory Publishing Services

The PUC ordered Verizon to provide to Worldcom directory publishing services at wholesale prices. The District Court rejected the recommendation, vacating this portion of the agreement.

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[7] MCI does not contest this result. It recognizes that the FCC will promulgate new wholesale pricing regulations and that the PUC will apply that standard on remand.

Verizon must offer at wholesale rates "any telecommunications service" to be resold by Worldcom. *See* 47 U.S.C. § 251(c)(4)(A). A telecommunications service is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *See* 47 U.S.C. § 153(46). Telecommunications means "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *See* 47 U.S.C. § 153(43). Directory publishing services include basic listings with customer telephone numbers, as well as additional services such as vanity numbers, bold and foreign listings in the White Pages, and non-listing and non-publication of customers' telephone numbers.

At issue is the price that Verizon may charge Worldcom for directory publishing services, which requires that we decide if directory publishing services are telecommunications services under the relevant statutory definitions. If they are, Verizon must charge wholesale rates. *See* 47 U.S.C. § 252(c)(4)(A). If they are not, Verizon may charge the tariffed rates. The District Court held that the statutory definitions could not be strained to include directory publishing services as telecommunications services. We agree.[8]

The PUC argues that it is undisputed that directory publishing services are retail tariff service offerings, that is, services offered by Verizon to retail customers at prices established in tariffs filed with the FCC or the PUC. While this perhaps is true, it is

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[8] We have found no cases addressing whether directory publishing services fit within the definitions of telecommunications services. We have found cases holding that directory publishing services are network elements within the meaning of § 153(29) that must be sold at the cost-based rates of S 252(d)(1). *See AT&T-Va.*, 197 F.3d at 674-75; *Bell-Atl.-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218, 251-52 (D. Del. 2000).

irrelevant. Section 251(c)(4) does not require the wholesale provision of all retail tariff services that an ILEC offers to subscribers, only the wholesale provision of telecommunications services. The two categories are not coextensive. All retail tariff services are not telecommunications services, given the limited definitions of § 153(43) and (46). Telecommunications services involve the offering of telecommunications, the transmission of information. Directory publishing services do not involve the transmission of information and do not fall within the statutory definitions.

These decisions, however, are not persuasive on the question of whether directory publishing services are telecommunications services, subject to a different statutory definition and a different pricing standard.

Verizon is not required to provide directory publishing services to Worldcom at wholesale prices for resale. It may provide such services at tariffed rates or at some other rates to be determined in a new interconnection agreement on remand to the PUC. We will therefore affirm the District Court on this issue.

5. Price of Unbundled Network Elements

The District Court held that the PUC's pricing model for the leasing of unbundled network elements did not use a forward-looking TELRIC pricing methodology, but an improper TSLRIC model. The court remanded the issue to the PUC to apply the proper pricing model. The District Court never addressed the PUC's actual application of its methodology or the details of the pricing decision that the PUC reached. We will vacate the District Court's decision and remand this issue to the District Court to review the details and substance, as opposed to the nomenclature, of the pricing model that the PUC used and the pricing decision it made.

The PUC must determine the "just and reasonable rate" to be charged for access to unbundled network elements, a rate that must be nondiscriminatory and "based on the cost . . . of

providing the . . . network element," along with a reasonable profit for the ILEC. *See* 47 U.S.C. § 252(d)(1)(A), (B); *Iowa Utils. II*, 219 F.3d at 749. The FCC has promulgated regulations establishing the methodology for determining the rates to be charged. *See Iowa Utils. I*, 525 U.S. at 384-85 (holding that FCC has jurisdiction to design a pricing methodology).

The rate must be based on the forward-looking TELRIC of a discrete network element plus a "reasonable allocation of forward-looking common costs." *See* 47 C.F.R. § 515.505(a). TELRIC is the "forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements." *See* 47 C.F.R. § 51.505(b).

We note several points about the FCC pricing regulations. First, TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." *See* 47 C.F.R. § 51.505(b)(1). Second, forward-looking costs are "economic costs efficiently incurred in providing a group of elements or services." *See* 47 C.F.R.§ 51.505(c)(1). Third, the sum of TELRIC and a reasonable allocation of forward-looking common costs "shall not exceed the stand-alone costs associated with the element." *See* 47 C.F.R. S 51.505(c)(2).

The Eighth Circuit struck down the FCC's TELRIC methodology, holding that § 51.505(b)(1) was inconsistent with the statutory language, in that it based prices on what the cost would be of particular elements if the ILEC provided the most efficient technology in the most efficient configuration of a hypothetical efficient network, rather than the actual cost of providing the elements of the actual, existing network. *See Iowa Utils. II*, 219 F.3d at 750; *id.* (stating that Congress did not intend rates to be based on the cost some imaginary ILEC would incur, but on the actual costs that ILECs incurred in sharing network elements).

The Eighth Circuit did hold that a forward-looking pricing methodology, if based on actual incremental costs incurred or that will be incurred by an ILEC, would produce a price consistent with the Act. *See id.* at 752-53. The court also rejected the argument that cost under § 252(d)(1)(A) must mean historical costs. *See id.* at 751. The Supreme Court granted certiorari on these issues, *see FCC v. Iowa Utils. Bd.*, 121 S. Ct. 878 (2001), leaving undecided the question of whether prices can be based on a hypothetical efficient network configuration until the Supreme Court determines the validity of the FCC regulations during its next term.

The FCC explained the terms TSLRIC and TELRIC. Under TSLRIC, "total service" refers to the entire quantity of the service (either single service or a class of similar services) that a firm produces, along with the costs of dedicated facilities and operations used in providing that service. *See* Local Competition Order ¶ 677. The FCC coined and adopted the term TELRIC in the Local Competition Order to describe a different version of that methodology, one based on the specific network element or elements to be priced. See id. ¶ 678. Essentially, TELRIC appears to be an unbundled version of TSLRIC methodology, pricing discrete network elements rather than entire services. The PUC and Verizon argued that the required TELRIC methodology was a version of TSLRIC and that the PUC's pricing model was proper.

The PUC set prices based on what it labeled a TSLRIC methodology.[9] But in reviewing that decision, the District Court did not look any further than the acronym applied by the PUC to determine whether, in fact, the PUC based prices on the forward-looking costs of discrete network elements. The record suggests that the PUC attempted to use a forward-looking, element-based methodology and believed that it had done so. The labels that the PUC used apparently confused the issue.

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[9] *See* A-1378 ("[W]e adopted the use of TSLRIC as the appropriate cost methodology to set prices for unbundled elements.")

The PUC's use of the TSLRIC acronym without more, however, does not provide a basis for vacating the pricing decision. The District Court never reviewed the substance of the pricing standard, never considered whether the inputs that the PUC used in setting prices (based on the pricing model offered by Verizon) were proper or whether the prices it established were consistent with the Act. This determination is primarily a factual issue, subject to substantial evidence review, that must be performed by the District Court in the first instance.

We will remand this issue to the District Court with instructions to review the substance and merits of the PUC methodology and its pricing decision and, with the guidance of the Supreme Court's expected ruling on the validity of the FCC regulations, to determine whether the prices for unbundled network elements established in the interconnection agreement comport with the Act.

## Conclusion

For the foregoing reasons, we will affirm the District Court's denial of the PUC's and Commissioners' claims of Eleventh Amendment sovereign immunity. As to the terms of the interconnection agreement, we will reverse the District Court's decision with respect to the wholesale rates set by the PUC and the pricing of unbundled network elements; we will affirm the District Court in all other respects. We remand this case to the District Court for further proceedings consistent with this opinion.

AMBRO, *Circuit Judge*, concurring in part and dissenting in part:

Judge Roth has written an exceptional opinion for the Court. I agree with its reasoning and conclusion that the Commonwealth has waived its sovereign immunity by regulating local telephone service in Pennsylvania within the confines of the Telecommunications Act of 1996. Nonetheless, I write separately to emphasize that our holding, and indeed the holdings of the many courts of appeals that have taken the same position, is a novel one and should be so recognized. I also write separately to dissent from the Court's holding that the collocation of remote switching modules can be required under the 1996 Act.

A.

We hold today that the 1996 Telecommunications Act fits within the narrow exception for "gratuity waivers" discussed in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-87 (1999). The "gratuity waiver" is an exception from the general rule, set forth in College Savings Bank, that no constructive waiver of sovereign immunity can be inferred from a state's involvement in an area subject to federal regulation. *See id.* at 686. There is reason to argue, however, that we are expanding the scope of the "gratuity waiver" exception beyond the examples given in *College Savings Bank*.

In discussing the general rule that there can be no "constructive waiver" of Eleventh Amendment immunity, and the resultant overruling of *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Supreme Court emphasized that effective waivers of sovereign immunity, like other constitutional rights, must involve the "intentional relinquishment or abandonment of a known right or privilege." *College Sav. Bank*, 527 U.S. at 682 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Requiring a

state to possess knowledge of its immunity and to intend to waive that immunity imparts upon the state a requirement of volition—it must wish to waive its immunity.

Moreover, the Court in *College Savings Bank* noted one other component of effective waiver; it requires a "'clear declaration' by the State of its waiver . . . to be certain that the State in fact consents to suit." *Id.* at 680 (emphasis in original). This expression of intentional relinquishment must be unequivocal. *Id.* That is, not only must the waiver be clear, but the state cannot equivocate in expressing its intent. Under these standards, it is the rare case that a federal court would find the waiver of sovereign immunity.

Despite the Supreme Court's invocation of these two hallmarks of effective sovereign immunity waiver—intention and clarity of expression—it left a vestige of constructive waiver in those situations in which the waiver is exacted as a condition to the state's acceptance of Congress's gratuity. *College Sav. Bank* at 686-87. The Court cited two cases in support of the concept of "gratuity waiver," *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Petty*, Congress approved a bistate commission created by an interstate compact containing a clause allowing suit. *Petty*, 359 U.S. at 277-78. The Court in *College Savings Bank* concluded that because states were barred from forming such compacts by the Constitution, Congress's consent to a compact was a gratuity in that it granted powers to a state entity previously denied to it. More importantly for our purposes, the Supreme Court held that this gratuity—the approval of an interstate compact—could be conditioned on the waiver of sovereign immunity and that courts could infer waiver from the state's acceptance of that gratuity. *College Sav. Bank*, 527 U.S. at 686. Similarly, in *South Dakota v. Dole*, states received funding from the federal government conditioned on each state's acceptance of a uniform drinking age. 483 U.S. at 205. In both cases, Congress lacked the

power to abrogate the states' sovereign immunity (in *Petty*) or require a mandatory drinking age (in *Dole*), but Congress's grant of a gratuity permitted it to require as a condition of the gift the very waiver or action it could not accomplish in its own right. *College Sav. Bank*, 527 U.S. at 686.

Notably, in both cases cited in College Savings Bank, it was entirely clear to the state from the face of the statute itself that it was agreeing to Congress's condition. For example, in *Petty*, Congress "approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." *Petty*, 359 U.S. at 280. Similarly, the statute at issue in *Dole* so clearly exacted a condition on the grant of highway funds that the State of South Dakota itself sued to establish its unconstitutionality. *Dole*, 483 U.S. at 205. Thus, we can assume that for "gratuity waivers" the clarity the Court demanded in *College Savings Bank*, for the state's expression of waiver has simply shifted sources. Rather than requiring a "'clear declaration' by the State," *College Sav. Bank*, 527 U.S. at 680, we now require a clear declaration from Congress that, by accepting the gratuity, the states will forfeit whatever rights Congress chooses to attach as a condition.[1] *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (finding an act of Congress does not clearly evince its intention to require states receiving funds to waive their sovereign immunity).

This requirement of clarity on Congress's part is a necessary component of inferring from a state's actions its decision to waive its sovereign immunity. Congress's clarity

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[1] This mirrors the requirement that Congress's abrogation of sovereign immunity be clear and unequivocal. *See Quern v. Jordan*, 440 U.S. 332, 343-44 (1979). Of course, abrogation and waiver are closely related. "Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." *College Sav. Bank*, 527 U.S. at 683.

of expression and the resulting action by the state substitute for the state's own expression of waiver. It is in satisfaction of this requirement of a "constructive waiver" that the courts of appeals have concluded that the 1996 Telecommunications Act clearly expresses Congress's intention to attach a condition to its gratuity of regulatory authority over local telephone service. *See* Maj. Opinion at 23-24 (listing cases); *but see Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 293 (4th Cir. 2001) ("[a] State official reading this provision would have no indication that the State commission, if it chose to make the reviewable determination, would be compelled to appear in federal court at the behest of an aggrieved telecommunications company").

Clarity, however, is only half of the requirements of effective waiver. As noted above, the Supreme Court emphasized in *College Savings Bank* that a waiver of sovereign immunity must also be "intentional." 527 U.S. at 682. The "gratuity waiver" of the Commonwealth that we approve today lacks on its face any indicia of being intentional. The Pennsylvania Utility Commission has steadfastly maintained that it did not intend to waive its immunity from suit and that its arbitration and approval of the interconnection agreement was an action taken pursuant to state law, not the 1996 Act. Of course, we recognized in the majority opinion that the 1996 Act federalized the provision of local telephone services and therefore rejected the PUC's reliance on state authority. *See Majority Op.* at 26-27; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("With regard to the matters addressed by the 1996 Act, [Congress has] unquestionably [taken the regulation of local telecommunications competition away from the States]").

Nonetheless, the PUC's reliance on state law is interesting for another reason. Unlike *Petty* and *Dole*, the PUC has not made any affirmative manifestation of its acceptance of Congress's gratuity, such as the new operation of a bistate commission or acceptance of federal highway funds. Instead,

it has merely continued what it has always done—regulate local telephone service for Pennsylvanians. When Congress has taken away the PUC's authority with one hand and returned it (albeit in a new framework) with the other, it is difficult to understand what it is that the PUC has to do to manifest its acceding to Congress's condition that it waive sovereign immunity. Indeed, we have no indication here that Pennsylvania intended to waive its sovereign immunity at all,[2] other than its continued presence in a field of regulation in which it has operated for the better portion of the twentieth century.

Thus, our case stands for the proposition that a "gratuity waiver" can exist even without conduct expressly accepting that gratuity, if Congress is sufficiently clear in structuring its condition. It is not simply that Congress has said that states will waive their sovereign immunity if they accept the new authority. Congress has said that if states continue to act as they have, they will waive their sovereign immunity, and thus has mandated that the states take action if they do not wish to waive their immunity. Conversely, the affirmative act indicating an intention to accept the gratuity is not the simple acceptance of new money or new authority, it is the failure to refuse the grant of an authority previously possessed.[3]

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[2] This stands in stark contrast to states such as Delaware, for example, which has authorized its utility commission to act pursuant to the 1996 Act. *See Bell Atlantic-Delaware v. McMahon*, 80 F. Supp. 2d 218, 232 (D. Del. 2000); 26 Del. Code S 703(4) (1998). While the Delaware General Assembly did not expressly waive its sovereign immunity by this statute, it is evidence that the State intended to accept the benefit of regulating under its mandate. *See Bell Atlantic-Delaware*, 80 F. Supp. 2d at 232 n.10.

[3] If we recognize that the constructive waiver in this case is inferred based on a state's continuing regulation of telecommunications, and not any affirmative acceptance of the 1996 Act, one might conclude that Congress has skirted dangerously close to creating a sanction and not the grant of a gratuity. The Court in *College Savings Bank* suggested a

Because I believe that questions of the constitutional viability of "cooperative federalism" will repeat themselves as long as Congress continues to fashion such creative regulatory regimes, we should acknowledge this novelty. *See College Sav. Bank*, 537 U.S. at 702-03 (Breyer, J., dissenting) (discussing the need for legislative flexibility to foster national uniformity in regulation while preserving local control). With as yet no Supreme Court determination with respect to the issue before us, I believe that the efficacy of "cooperative federalism" requires our Court's flexibility in this instance.

B.

I also respectfully dissent from the majority's interpretation of collocation requirements of the 1996 Telecommunications Act. The Act forces ILECs "to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6) (emphasis added).

The majority affirms the District Court's order affirming the PUC's determination that Worldcom be permitted to collocate remote switching modules in Verizon's offices. Instead, I would adopt the position that locating remote

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distinction between a condition placed on a gift and a sanction—the former being an acceptable means of securing the waiver of sovereign immunity from a state and the latter not. *College Sav. Bank*, 527 U.S. at 687. A sanction exists if Congress excludes "the State from otherwise permissible activity." *Id.* As the majority correctly notes, because the 1996 Act removes local telephone regulation from the states and because doing so is wholly lawful, *see Hodel v. Virgina Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 290 (1981), it is not a sanction. Maj. Op. at 26-27. Thus, while Pennsylvania has waived its sovereign immunity without an affirmative expression of its acceptance of a gratuity, it is nevertheless a gratuity that it has received.

switching modules in the central offices of an ILEC (Verizon) is not "necessary to interconnect" to the ILEC's network. 47 U.S.C. S 251(c)(6); *see GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423-24 (D.C. Cir. 2000) (FCC regulations permitting collocation of remote switching modules exceeds the reach of § 251(c)(6) by interpreting "necessary" to mean efficient or useful).

While the majority correctly notes that the FCC has promulgated new regulations in response to the D.C. Circuit's ruling in *GTE Serv. Corp.*, those regulations continue to permit the collocation of remote switching modules without regard for Congress's express limitations in § 251(c)(6) to those devices "necessary" to interconnect. The majority's reasoning is plausible. Yet it has substituted its responsibility to interpret what "necessary" means with broad policy statements regarding what it believes to be the most efficient means of accomplishing collocation. Assuming the remote switching devices result in certain efficiencies, they are not necessary for interconnection of CLECs to the ILEC's network. Because I would adopt the position of the D.C. Circuit that the term "necessary" constrains the authority of the PUC to mandate collocation of devices that do more than provide the essential interconnection required by the Telecommunications Act, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed November 2, 2001]

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Nos. 00-2619/2620

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BELL ATLANTIC-PENNSYLVANIA, INC.,

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, Chairman of the Pennsylvania Public Utility Commission, in his individual and official capacities; ROBERT K. BLOOM, Vice-Chairman of the Pennsylvania Public Utility Commission, in his individual and official capacities; NORA MEAD BROWNELL, Commissioner of the Pennsylvania Public Utility Commission, in her individual and official capacities; AARON WILSON, JR., Commissioner of the Pennsylvania Public Utility Commission, in his individual and official capacities; VINCENT J. FUMO, State Senator Vincent J. Fumo; ROGER A. MADIGAN, State Senator Roger A. Madigan; MARY JO WHITE, State Senator Mary Jo White,

UNITED STATES OF AMERICA,
*(Intervenor-Plaintiff in D.C.)*,

MCI WORLDCOM NETWORK SERVICES, INC.; MCIMETRO ACCESS TRANSMISSION SERVICES, LLC; AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.; TCG PITTSBURGH; TCG DELAWARE VALLEY; SPRINT COMMUNICATIONS COMPANY, L.P.; THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA,

*(Intervenors-Defendants in D.C.)*,

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VINCENT J. FUMO; ROGER A. MADIGAN, MARY JO WHITE,
*Appellants* (00-2619),

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN; ROBERT K. BLOOM; NORA MEAD BROWNELL; AARON WILSON, JR.,
*Appellants* (00-2620).

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 99-cv-05391)
District Judge: Honorable Marvin Katz

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Argued June 21, 2001

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OPINION OF THE COURT

Before: ROTH, AMBRO and FUENTES, *Circuit Judges*.

ROTH, *Circuit Judge*:

The Pennsylvania Public Utility Commission (PUC), several PUC Commissioners, and several Pennsylvania State Senators appeal the District Court's denial of their motions to dismiss the claims and cross-claims brought against them under the Telecommunications Act of 1996 by Bell Atlantic (now known as Verizon), MCI/Worldcom (Worldcom), and AT&T. The PUC and the Commissioners argue that under the Eleventh Amendment they are immune from suit in federal court and that the claims and cross-claims against them are untimely and barred by *res judicata*.

For the reasons stated in our decision in *MCI Telecomm. Corp. v. Verizon Pennsylvania, Inc.*, [Nos. 00-2257, 00-2258, November 2, 2001] ___ F.3d ___ (3d Cir. 2001), decided this day, we will affirm the District Court's denial of the defense of sovereign immunity under the Eleventh Amendment to the United States Constitution. We further hold that we have no

jurisdiction to hear the PUC's remaining claims on appeal; we will dismiss them for want of jurisdiction and remand the case to the District Court.

## I. Background

The statutory background of the Telecommunications Act of 1996 and a discussion of its operation is set out in our companion opinion in MCI Telecomm. The Act essentially requires incumbent local exchange carriers (ILECs) to share their networks and services with competitive local exchange carriers (CLECs) seeking entry into the local service market.

Verizon, an ILEC, was involved in negotiations with Worldcom, a CLEC, to provide local service in Pennsylvania. These talks were part of several ongoing negotiations for interconnection agreements proceeding before the PUC. In 1998, the PUC initiated discussions aimed at a global settlement of a variety of pending and anticipated issues arising in several different dockets. Competing petitions were filed with the PUC by two groups, one consisting of Verizon and other companies, the other consisting of AT&T, Worldcom, the State Senators, and others who had opposed Verizon in various PUC proceedings.

In September 1999, the PUC issued a Global Order, resolving the issues before it and ordering that the decisions be incorporated into interconnection agreements. Verizon appealed the Global Order to the Commonwealth Court of Pennsylvania, primarily challenging it on state law grounds. Verizon did assert its federal claims under the 1996 Act in the Commonwealth Court although Verizon claims that this was done solely for the purpose of making a reservation of the federal issues, pursuant to *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 421 (1964) (holding that plaintiff may preserve federal claims by presenting them to state court only for the purpose of informing the state court of their existence and nature).

Verizon then brought suit in federal district court against the PUC and individual PUC Commissioners under § 252(e)(6), challenging terms of the Global Order as being inconsistent with the 1996 Act.[1] Worldcom and AT&T intervened as defendants and counterclaimed and cross-claimed to challenge other aspects of the Global Order. Several Pennsylvania Senators intervened as defendants. The United States intervened as plaintiff to defend the constitutionality of § 252(e).

The Senators, the PUC, and the Commissioners moved to dismiss the suit on grounds, among others, that the PUC and the Commissioners were immune from suit in federal court under the Eleventh Amendment, that Worldcom's and AT&T's cross-claims were untimely, and that the remainder of the claims should be dismissed for failure to state a claim. The District Court denied the motions in all respects.[2]

The PUC, the Commissioners, and the Senators immediately appealed the District Court's decision, not only the Eleventh Amendment immunity ruling but also the denial of the bar of the statute of limitations and *res judicata*.

## II. Collateral Order Doctrine

With certain exceptions not applicable here, we may take jurisdiction of appeals only from the entry of a final judgment by a District Court. *See* 28 U.S.C.S 1291; *Cunningham v. Hamilton County*, 527 U.S. 198, 200 (1999). A decision ordinarily is final when it ends the litigation and leaves

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[1] During the pendency of the instant appeal, Verizon notified this Court that it was withdrawing its underlying claims in the District Court. Because the cross-claims and counterclaims remain, the case has not been rendered moot.

[2] The District Court also considered and rejected arguments that it should abstain from hearing the case, pursuant to a variety of federal abstention doctrines. The abstention issues have not been appealed and are not before us.

nothing for the court to do but execute the judgment. *See id.* at 204 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988)).

The Supreme Court has interpreted the phrase "final decision" in § 1291 to include a narrow class of orders that do not terminate the litigation but are conclusive of a disputed legal question apart from the merits and are effectively unreviewable on appeal from a final judgment in the underlying action. *See Cunningham*, 527 U.S. at 204; *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68 (1994). The collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), is a practical construction of the final decision rule of § 1291, applicable to a narrow class of decisions that are considered final in the interest of achieving a healthy and efficient legal system. *See Digital*, 511 U.S. at 867. An order is immediately reviewable under *Cohen* if it 1) conclusively determines a disputed legal question, 2) resolves an important issue completely separable from the merits of the action, and 3) is effectively unreviewable on appeal from a final judgment. *See Bines v. Kulayat*, 215 F.3d 381, 384-85 (3d Cir. 2000) (quoting *Transtech Indus., Inc. v. A&Z Septic Clean.*, 5 F.3d 51, 55 (3d Cir. 1993)).

Importantly, the collateral order doctrine is narrow and limited to a small class of cases. *See Digital*, 511 U.S. at 868 ("[T]he 'narrow' exception should stay that way and never be allowed to swallow the general rule."); *see also Bines*, 215 F.3d at 384; *Transtech*, 5 F.3d at 57. The application of the doctrine does not turn on whether the litigation will be speeded along by immediate review. *See Digital*, 511 U.S. at 868. The fact that an erroneous ruling may result in additional litigation expenses is not alone sufficient to justify immediate review. *See Transtech*, 5 F.3d at 56; *see also* 15A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3914.6, 529 (recognizing that "much time and money are spent on trial court proceedings

that ultimately prove abortive," but stating that the "cost is tolerated because of the fundamental calculus of the final judgment rule").

The District Court denied motions to dismiss the complaint and cross-claims by the PUC, the Commissioners, and the Senators. The denial of a motion to dismiss does not end the litigation and ordinarily is not a final order for § 1291 purposes. § 15A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3914.6 at 526 ("Orders refusing to dismiss an action almost always are not final."). We may assert appellate jurisdiction over the issues before us only if they are the types of claims which fall within the narrow class of decisions immediately reviewable under the collateral order doctrine of *Cohen*.

A. Sovereign Immunity

We have jurisdiction over the Eleventh Amendment issues because the denial of a defense of sovereign immunity is immediately appealable under the collateral order doctrine. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

The sovereign immunity issue in the instant case was consolidated for oral argument with the immunity issue in *MCI Telecomm.*, ___ F.3d ___, decided this day. The legal issues and arguments in both cases are substantially identical and we need not repeat them in the instant opinion. The result on the merits is also the same: Neither the PUC nor the Commissioners have Eleventh Amendment immunity from an action under § 252(e)(6). For the reasons stated in our opinion in *MCI Telecomm*, we will affirm the District Court's conclusion that the Eleventh Amendment does not bar the actions against the PUC and the Commissioners.

B. *Res Judicata* and Statute of Limitations

We turn now to the two remaining issues on appeal: the PUC's argument that the claims and cross-claims against it are untimely and are barred by *res judicata*.

The PUC suggested at oral argument that, because we have collateral order doctrine jurisdiction over the sovereign immunity issue, we had the discretion to reach and decide the remaining issues in the interest of judicial economy, regardless of whether those issues are themselves immediately reviewable under the collateral order doctrine. We reject that suggestion. Our appellate jurisdiction is established by statute. We can exercise no jurisdiction other than as provided by statute. The fact that we have jurisdiction over one issue on an appeal does not grant us discretion to decide unrelated issues which lack an independent basis for jurisdiction. *See Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993) (stating that the fact that court had collateral order jurisdiction to review denial of immunity defense "is not sufficient to confer on us jurisdiction to review other claims presented to the district court" because "[o]therwise non-appealable issues cannot be bootstrapped to an appealable question"). Nor are concerns for judicial economy alone a sufficient consideration to create jurisdiction. *See Digital*, 511 U.S. at 868.

We reach the merits of the two remaining issues only if they are subject to immediate review under *Cohen*. We conclude that neither the denial of a motion to dismiss on *res judicata* grounds nor the denial of a motion to dismiss on statute of limitations grounds is immediately appealable under the collateral order doctrine. We lack jurisdiction to address either of these issues on their merits and for the reasons that follow we will dismiss the appeal of these claims for want of appellate jurisdiction.

Not only is it generally recognized that the denial of a motion to dismiss on *res judicata*, or claim preclusion, grounds should not be immediately appealable, *see, e.g.*, *Digital*, 511 U.S. at 873; *Transtech*, 5 F.3d at 58; *see also* 15A Wright, Miller, Cooper, *Federal Practice and Procedure* § 3911.4 at 424-26, but more particularly the defense of claim

preclusion in the instant case fails the first and third prongs of the Cohen standard. First, the District Court's decision did not conclusively resolve the claim preclusion issue because the District Court never addressed or resolved it. The Pennsylvania Commonwealth Court decision to which the PUC seeks to accord preclusive effect did not issue until after the District Court had rendered its decision. Although the District Court took explicit notice of the pendency of the state court action, there was no state court decision for it to consider at the time. The court never had an opportunity to address the *res judicata* effect of the state court judgment and cannot be deemed to have conclusively resolved that legal issue for purposes of collateral order doctrine jurisdiction.[3]

Second, the denial of a defense of claim preclusion is not effectively unreviewable on appeal from final judgment. We have recognized two distinct categories of affirmative defensive immunities: those that provide immunity from suit and those that provide only a defense against liability. *See Puerto Rico Aqueduct*, 506 U.S. at 143-44 (discussing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)) (distinguishing immunities from suit from defenses to liability); *see also* 15 A Wright, Miller, Cooper, *Federal Practice and Procedure* § 3914.6 at 529 ("[S]ome rights are intended to protect against the burdens of trial, not just the burden of a judgment that, if erroneous, can be reversed on appeal.").

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[3] We also could decline to address the *res judicata* issue for a second, unrelated reason: the argument was not raised in the District Court. Our general practice is not to address legal issues not raised below, absent exceptional circumstances. *See Berda v. CBS, Inc.*, 881 F.2d 20, 28 (3d Cir. 1989). No such exceptional circumstances are present and neither the PUC nor the Senators point to any such circumstances. Moreover, Verizon argues that its England reservation in the Common-wealth Court preserved its federal claims and avoids the preclusive effect of the state court decision. The sufficiency and effect of that reservation is in dispute and should be addressed by the District Court in the first instance.

An immunity from suit generally is grounded in the need to free parties from the costs, burdens, and consequences of having to be party to an action and to defend one's self. Such a right will be forfeited if not vindicated prior to trial, *see Transtech*, 5 F.3d at 56; 15A Wright, Miller, Cooper, *Federal Practice and Procedure* § 3914.6 at 529-30; and its denial should be subject to immediate review. *See, e.g., Puerto Rico Aqueduct*, 506 U.S. at 144 (state sovereign immunity immediately appealable); *Mitchell*, 472 U.S. at 526 (qualified executive immunity immediately appealable); *Larsen v. Senate of Commonwealth of Pennsylvania*, 152 F.3d 240, 245 (3d Cir. 1998) (legislative immunity immediately appealable). Defenses to ultimate liability should not be subject to immediate review. *See We, Inc. v. City of Philadelphia*, 174 F.3d 322, 326 (3d Cir. 1999) (concluding that *Noerr-Pennington* immunity was defense to liability and not immediately appealable); *Transtech*, 5 F.3d at 58 (holding that defense that suit barred by prior settlement or release is not immediately appealable).

The fact, however, that a defense may warrant pre-trial dismissal is not dispositive of whether it is immediately appealable. *See Digital*, 511 U.S. at 873 (rejecting notion that every right that could be enforced by pretrial dismissal can be understood as conferring a right not to stand trial); *We, Inc.*, 174 F.3d at 325 ("Not all defenses that warrant a pretrial dismissal entail a right not to stand trial."). We must determine the essential nature of the right to be protected to decide whether it is an immunity from trial or merely a defense to liability.

An examination of the doctrine *res judicata* or claim preclusion reveals that it is better understood as a defense against liability, not an absolute guarantee against having to face a suit. Claim preclusion entitles a party to rely on prior judicial decisions and not to be held liable on claims on which that party previously has prevailed. Claim preclusion is

based on concerns of fairness, on reliance on the finality of prior judicial determinations, and on the expectation of not having to conform primary conduct to inconsistent decisions and inconsistent legal obligations. *See E.E.O.C. v. United States Steel Corp.*, 921 F.2d 489, 492 (3d Cir. 1990) (stating that claim preclusion fosters reliance on prior judicial decisions by minimizing the possibility of inconsistent judgments). It is not, however, an explicit guarantee that trial will not occur. Unlike qualified immunity or Eleventh Amendment sovereign immunity, claim preclusion is not based on a right to be free from all the costs and burdens of having to be a party to a case in the first instance or from having to defend oneself.

The interests protected by claim preclusion will not be irretrievably forfeited if the PUC must wait until after trial to appeal an erroneous *res judicata* determination. Perhaps that vindication will come after a delay and at a higher cost, but such cost is insufficient to establish collateral order doctrine jurisdiction.

We turn now to the denial of the statute of limitations defense. A statute of limitations defense is considered to be of the same mold as claim preclusion. A denial of both is similarly unsuitable for immediate review. *See , e.g., Digital*, 511 U.S. at 873 (discussing statute of limitations as same type of defense as claim preclusion, both presumptively not immediately appealable as part of a right not to stand trial); *Transtech*, 5 F.3d at 58 (rejecting immediate appealability of denial of defense that suit barred by settlement because recognizing immediate appeal in that circumstance would require recognizing immediate appeal for litigants asserting affirmative and dispositive defense of statute of limitations).

The statute of limitations defense fails the third prong of the *Cohen* standard because it is not effectively unreviewable on appeal from final judgment. *See Brown v. United States*, 881 F.2d 615, 619 (3d Cir. 1988); *see also Parmar v. Jeetish*

*Imp., Inc.*, 180 F.3d 401, 402 (2d Cir. 1999) ("[T]he denial of a statute-of-limitations defense may effectively be reviewed on appeal from a final judgment."); *Triad*, 10 F.3d at 496 n.2 ("Limitations issues fail the last prong of this test."). *In Powers v. Southland Corp.*, 4 F.3d 223, 237 (3d Cir. 1993), we held that an order joining a party to a lawsuit despite the lapse of the limitations period was not appealable under the collateral order doctrine. We based that decision on our view that the statute of limitations provided only a right to repose that would not be irreparably lost if appeal must await final judgment. *See id.* at 232-33 (citing *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981)).

Statutes of limitations are not guarantees that suit and trial will not occur on untimely claims. Limitations periods are designed to foreclose the potential for inaccuracies and unfairness brought about by a finding of liability based on stale evidence. *See Powers*, 4 F.3d at 233 (quoting Levine, 658 F.2d at 127). This interest is not in defending against an old claim, but an interest in not being held ultimately liable on that old claim based on old, less reliable evidence. Such an interest is not irretrievably lost if a party must wait until after final judgment to appeal the adverse ruling and to vindicate the right to be free from liability. Again, the litigation costs may be increased by the delay, but that alone is insufficient to establish jurisdiction.

## III. Conclusion

We will affirm the District Court's denial of the claims of Eleventh Amendment sovereign immunity. We lack appellate jurisdiction of the remainder of the issues on appeal; we will dismiss that portion of the appeal and remand this case to the District Court for further proceedings consistent with this opinion.

AMBRO, *Circuit Judge*, concurring in part:

I concur in Judge Roth's excellent opinion for the same reasons set out in my concurrence in the companion opinion issued today in *MCI Telecommunications Corp., et al. v. Bell Atlantic-Pennsylvania, Inc., et al.*, Nos. 00-2257/58.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 00-2257

---

MCI TELECOMMUNICATION CORPORATION, a Delaware Corporation; MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware Corporation;

AT&T COMMUNICATION OF PENNSYLVANIA; UNITED STATES OF AMERICA
(*Intervenor-Plaintiffs* in District Court)

v.

BELL ATLANTIC-PENNSYLVANIA; PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA M. BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission

PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,

*Appellants.*

---

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 97-cv-01857)
District Judge: Honorable Sylvia H. Rambo

---

Before: MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, BARRY, AMBRO, and FUENTES, *Circuit Judges*.

ORDER

The petition for rehearing *en banc* filed by the appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: JAN 4, 2002

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed February 21, 2002]

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No. 00-2257

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MCI TELECOMMUNICATIONS CORPORATIONS, *et al.*,

v.

BELL ATLANTIC-PENNSYLVANIA, *et al.*,
Pennsylvania Public Utility Commission, *et al.*,
*Appellants.*

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Present: ROTH, *Circuit Judge.*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until April 11, 2002.

_____
Circuit Judge

Dated: FEB 26, 2002

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 00-2620

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BELL ATLANTIC-PENNSYLVANIA, INC.

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, Chairman of the Pennsylvania Public Utility Commission, in his individual and official capacities; ROBERT K. BLOOM, Vice-Chairman of the Pennsylvania Public Utility Commission, in his individual and official capacities; NORA MEAD BROWNELL, Commissioner of the Pennsylvania Public Utility Commission, in her individual and official capacities; AARON WILSON, JR., Commissioner of the Pennsylvania Public Utility Commission, in his individual and official capacities; VINCENT J. FUMO, State Senator Vincent J. Fumo; ROGER A. MADIGAN, State Senator Roger A. Madigan; MARY JO WHITE, State Senator Mary Jo White,

UNITED STATES OF AMERICA
(*Intervenor-Plaintiff* in D.C.),

MCI WORLDCOM NETWORK SERVICES, INC.; MCIMETRO ACCESS TRANSMISSION SERVICES, LLC; AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.; TCG PITTSBURGH; TCG DELAWARE VALLEY; SPRINT COMMUNICATIONS COMPANY, L.P.; THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA,

(*Intervenors-Defendants* in D.C.).

The Pennsylvania Public Utility Commission;
John M. Quain; Robert K. Bloom;
Nora Mead Brownell; Aaron Wilson, Jr.,
Appellants (00-2620)

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 99-cv-05391)
District Judge: Honorable Marvin Katz

---

Before: MANSMANN, SCIRICA, ALITO, ROTH, AMBRO, and FUENTES, *Circuit Judges*.

ORDER

The petition for rehearing *en banc* filed by the appellant-defendants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

_____
Circuit Judge

Dated: JAN 15 2002

## APPENDIX F

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- U.S. CONST. art. I, §8, cl. 3 ("Commerce Clause"): "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
- U.S. CONST. art. VI ("Supremacy Clause"): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
- U.S. CONST. amend. X ("Tenth Amendment"): "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
- U.S. CONST. amend. XI ("Eleventh Amendment"): "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."
- 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
- 47 U.S.C. §153(41): "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers."

- 47 U.S.C. §252(e)(1): "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."
- 47 U.S.C. §252(e)(4) in pertinent part: "No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."
- 47 U.S.C. §252(e)(5): "If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [Federal Communications] Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission."
- 47 U.S.C. §252(e)(6) in pertinent part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section."
- 47 U.S.C. §252(i): "A local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

- 47 U.S.C. §253(d): "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."
- 47 U.S.C. §261(b): "Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."
- PA. CONST. art. I, §11: "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."
- PA. CONST. art. V, §9 in pertinent part: "[T]here shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law."
- 1 Pa.C.S. §2310: "Pursuant to section 11 of Article 1 of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a

claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) or 62 (relating to procurement) unless otherwise specifically authorized by statute."

- 42 Pa.C.S. §763 in pertinent part: "[T]he Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases: (1) All appeals from . . . the Pennsylvania Public Utility Commission . . . and from any other Commonwealth agency having Statewide jurisdiction."
- 66 Pa.C.S. §3001 in pertinent part: "The General Assembly finds and declares that it is the policy of this Commonwealth to: . . . (4) Provide diversity in the supply of existing and future telecommunications services and products . . . ., . . . (7) Promote and encourage the provisions of competitive services by a variety of service providers on equal terms throughout all geographic areas of the Commonwealth. (8) Encourage the competitive supply of any service in any region where there is market demand."
- 66 Pa.C.S. §3009(a) in pertinent part: "The [Pennsylvania Public Utility] commission may certify more than one local exchange telecommunications company to provide local telecommunications service."

No. 01-1477

Supreme Court, U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*
*Petitioners*,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
*Respondents*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI WORLDCOM NETWORK SERVICES, INC.,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

## SUPPLEMENTAL APPENDIX TO PETITION FOR WRITS OF CERTIORARI

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed July 11, 2000]

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Civil No. 1:CV-97-1857

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MCI TELECOMMUNICATIONS CORP. and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
*Plaintiffs*,

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC. and
UNITED STATES DEPARTMENT OF JUSTICE,
*Plaintiff-Intervenors*,

v.

BELL ATLANTIC-PENNSYLVANIA, INC.; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,

*Defendants*.

---

### AMENDING ORDER

On June 30, 2000 the court issued a memorandum of law and accompanying order disposing of the cross motions for summary judgment in the captioned action. Since that time, it has come to the court's attention that there is an inconsistency between the memorandum and the order with regard to Count I of Bell Atlantic Pennsylvania, Inc.'s counterclaim and crossclaim (the collocation issue). Accordingly, IT IS HEREBY ORDERED THAT the court's June 30, 2000 order

(Doc. 178) is AMENDED such that Paragraph 2 of the order should read, in relevant part, as follows:

> (2) MCI's motion for summary Judgment on Counts I through III of Bell's counterclaim is granted in part and denied in part as follows:
>
> > (a) The motion is granted as to Count I. The PUC's decision regarding MCI's collocation of its remote switching modules in Bell's central offices is affirmed.

The order remains as originally written in all other respects.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: July 11, 2000.

## APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 30, 2000]

---

Case No: 1-97-CV-1857

---

MCI TELECOMMUNICATION CORP. and
MCI METRO ACCESS TRANSMISSION SERVICES,
*Plaintiff*,

AT & T COMMUNICATIONS OF PENNSYLVANIA, INC. and
UNITED STATES DEPARTMENT OF JUSTICE,
*Plaintiff-Intervenors*,

v.

BELL ATLANTIC-PENNSYLVANIA, INC.; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,

*Defendants*.

---

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of the Pennsylvania Public Utility Commission and MCI Telecommunications Corp., on

Count I of Bell Atlantic-Pennsylvania, Inc's. Crossclaim and Counterclaim, and against Bell Atlantic-Pennsylvania, Inc.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of Bell Atlantic-Pennsylvania, Inc., and against, MCI Telecommunications Corp., and the Pennsylvania Public Utility Commission, on Count 11 of Bell Atlantic-Pennsylvania Inc's. Crossclaim and Counterclaim.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of MCI Telecommunication Corp., AT&T Telecommunications of Pennsylvania, Inc. and the Pennsylvania Public Utility Commission, and against Bell Atlantic-Pennsylvania Inc., on Count III of Bell Atlantic-Pennsylvania Inc's. Crossclaim and Counterclaim.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of MCI Telecommunications Corp., and against, Bell Atlantic-Pennsylvania Inc., and the Pennsylvania Public Utility Commission, on Counts III, IV, V; and in favor of AT&T Communication of Pennsylvania, Inc., and against MCI Telecommunications Corp., on Count VI of MCI Telecommunications Corp's. Claims.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby ordered in favor of MCI Telecommunication Corp. and AT&T Telecommunications of Pennsylvania, Inc, and against the Pennsylvania Public Utility Commission and Bell Atlantic-Pennsylvania, Inc. on Count VI of MCI Telecommunications Corp's. Claims.

Mary E. D'Andrea, Clerk of Court

/s/ Mark J. Armbrister
(By) MARK J. ARMBRISTER, Deputy Clerk

Date: June 30th, 2000

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 30, 2000]

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Civil No. 1:CV-97-1857

---

MCI TELECOMMUNICATIONS CORP. and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
*Plaintiffs*,

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.
and UNITED STATES DEPARTMENT OF JUSTICE,
*Plaintiff-Intervenors*,

v.

BELL ATLANTIC-PENNSYLVANIA INC; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,
*Defendants*.

---

ORDER

In accordance with the foregoing memorandum of law, IT IS HEREBY ORDERED THAT the Report and Recommendation of Magistrate Judge Durkin is ADOPTED IN PART AND REJECTED IN PART as follows:

(1) MCI's motion for summary judgment on Counts III through VI of its complaint is granted in part as follows:

(a) The motion is granted as to Counts III and IV. The matter is remanded to the PUC to reform the interconnection agreement to reflect that Bell shall

provide MCI with access to the loop distribution element and its dark fiber.

(b) The motion is granted as to Count V. The matter is remanded to the PUC to reform the interconnection agreement to permit MCI to interconnect with Bell at one point in each local access and transport area.

(c) The motion is granted as to Count VI. The matter is remanded to the PUC to reconsider its decision regarding pricing of unbundled network elements in accordance with the current law and regulations.

(2) MCI's motion for summary judgment on Counts I through III of Bell's counterclaim is granted in part and denied in part as follows:

(a) The motion is granted as to Count I. The matter is remanded to the PUC to reform the interconnection agreement to permit MCI to collocate its remote switching modules in Bell's central offices.

(b) The motion is granted as to Count III. The PUC's decision regarding the wholesale pricing discount applicable to MCI's resale of Bell services is affirmed.

(c) The motion is denied as to Count II. The matter is remanded to the PUC to reform the interconnection agreement to reflect that Bell is not required to sell MCI its directory publishing services at a wholesale discount.

(3) The PUC's motion for summary judgment on Counts III through VI of MCI's complaint is denied, in accordance with paragraph (1) of this order.

(4) The PUC's motion for summary judgment on Counts I through III of Bell's counterclaim is granted in part and denied in part as follows:

(a) The motion is granted as to Counts I and III, in accordance with paragraph (2)(a) and (b) of this order.

(b) The motion is denied as to Count II, in accordance with paragraph (2)(c) of this order.

(5) Bell's motion for summary judgment as to Counts III through VI of MCI's complaint is denied, in accordance with paragraph (1) of this order.

(6) Bell's motion for summary judgment as to Counts I through III of its crossclaim and counterclaim is granted in part and denied in part as follows: (a) The motion is granted as to Count TI, in accordance with paragraph (2)(c) of this order.

(a) The motion is granted as to Count II, in accordance with paragraph (2)(c) of this order.

(b) The motion is denied as to Counts I and III, in accordance with paragraph (2)(b) of this order.

(7) AT&T's motion for summary judgment is granted as follows:

(a) The motion is granted as to Count VI of MCI's complaint, in accordance with paragraph (1)(c) of this order.

(b) The motion is granted as to Count III of Bell's counterclaim and crossclaim, in accordance with paragraph (2)(b) of this order.

(8) Count II of MCI's complaint is deemed withdrawn.

(9) The Clerk of Court shall enter judgment and remand the captioned action consistent with this order and close the file.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: June 30 , 2000.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 30, 2000]

---

Civil No. 1:CV-97-1857

---

MCI TELECOMMUNICATIONS CORP. and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
*Plaintiffs*,

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC. and
UNITED STATES DEPARTMENT OF JUSTICE,
*Plaintiff-Intervenors*,

v.

BELL ATLANTIC-PENNSYLVANIA, INC.; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,
*Defendants*.

---

### MEMORANDUM

Before the court are objections filed to the September 16, 1999 report and recommendation ("R&R") of Magistrate Judge Durkin regarding the crossmotions for summary judgment filed by the following parties: (1) Defendant Bell Atlantic-Pennsylvania ("Bell");[1] (2) Plaintiff MCI Tele-

---

[1] Bell filed motions for summary judgment in favor of its crossclaims and counterclaims and in opposition to all issues raised in the complaints of MCI and AT&T.

communications Corp. ("MCI");[2] (3) Plaintiff-Intervenor AT&T Communications of Pennsylvania, Inc. ("AT&T"); and Defendants Pennsylvania Public Utility Commission and its commissioners (hereinafter collectively referred to as "PUC"). Specifically, objections were filed by Bell and the PUC. The issues have been briefed by the parties,[3] and the matter is ripe for disposition.

I. *Background*

The instant case arises out of decisions by the PUC implementing the local competition provisions of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. §§ 251-261. Both MCI and Bell have filed claims challenging certain aspects of an agreement between them that was arbitrated and approved by the PUC, pursuant to the Act.

A detailed factual background is set forth in Magistrate Durkin's R&R and the documents referenced therein. Therefore, in the interest of brevity, the court will incorporate the R&R's background by reference.

A. *Report and Recommendation*

In his R&R, Magistrate Durkin recommended that the summary judgment motions of MCI, Bell, the PUC and AT&T be granted in part and denied in part as follows:

> MOTIONS OF MCI FOR SUMMARY JUDGMENT
>
> 1. With regard to MCI's request for unbundled access to the loop distribution element, this matter be remanded to the PUC with directions to reform the interconnection agreement to reflect that Bell had not sustained its burden to show technical infeasibility with regard to

---

[2] MCI filed motions for summary judgment both in favor of its claims and in opposition to all of Bell's crossclaims and counterclaims.

[3] In addition to the briefs filed by the parties in support and opposition the objections to the R&R, an amicus curiae brief was filed by the United States of America, Federal Communications Commission ("FCC").

unbundled access to the loop distribution element, and to apply the "impairment" standard as reinterpreted by the FCC;

2. With respect to MCI's request of access to dark fiber, this matter be remanded to the PUC with directions to reform the interconnection agreement to reflect dark fiber is a network element and to apply the impairment standard as reinterpreted by the FCC;

3. With respect to MCI's request for access to Bell's directory assistance database, this issue be dismissed as moot;

4. With respect to the issue regarding the PUC's decision to require MCI to interconnect with Bell in each access tandem serving area, judgment be entered in favor of MCI and against the PUC and Bell, and this matter be remanded to the PUC with directions to reform the interconnection agreement to permit MCI to interconnect with Bell at one point in each local access and transport area;

5. With respect to the issue regarding the PUC's pricing decision, this matter be remanded to the PUC with direction that the PUC reconsider its decision in light of the FCC rules.

MOTIONS OF BELL FOR SUMMARY JUDGMENT ON ITS CROSSCLAIM AND COUNTERCLAIM

1. With respect to the issue regarding the PUC's decision to allow MCI to collocate remote switching modules in Bell's central office, judgment be entered in favor of the PUC and MCI and against Bell;

2. With respect to the issue regarding the PUC's decision to require Bell to sell MCI its directory publishing services at wholesale discount judgment be entered in favor of the PUC and MCI and against Bell;

3. With respect to the issue regarding the PUC's decision in setting the wholesale discount applicable to MCI's resale of Bell services, this matter be remanded to the PUC with direction to reconsider its decision on this issue after the Eighth Circuit, on remand from the Supreme Court, has considered whether the-FCC's rules and methodology comport with the Act.

MOTION OF THE PUC FOR SUMMARY JUDGMENT

1. Since the PUC's motion relates to every issue raised in the motions for MCI and Bell, judgment be entered or in the issues be remanded to the PUS, as set forth above in connection with the motions of MCI and Bell.

MOTION OF AT&T FOR SUMMARY JUDGMENT

1. Since AT&T's intervention in this case and its motion for summary judgment relates only to the pricing issues, this matter be remanded to the PUC as set forth above in connection with the motions of MCI and Bell. (R&R at 48-50.)

B. *Objections to the Report and Recommendation*

Objections were filed by Bell and the PUC as follows:

1. *Bell's Objections*

With regard to the parties' cross-motions for summary judgment relating to MCI's claims, Bell objects to Magistrate Durkin's R&R on the following issues: (1) remand of MCI's request for unbundled access to the Loop distribution element (Count III) to the PUC; (2) determination that dark fiber is a "network element" as defined in the Act, and remand of MCI's request for unbundled access to Bell's dark fiber (Count IV) to the PUC; (3) entry of judgment in favor of MCI on its request to reverse the PUC's decision to require MCI to interconnect with Bell's network in each access tandem

serving area and to permit MCI to interconnect at one point in each local access and transport area ("LATA") (Count V); and (4) remand of PUC's pricing decision with regard to unbundled network elements ("'UNE") to the PUC with the direction that the PUC reconsider its decision in light of the FCC rules which were reinstated by the Supreme Court in *AT&T Corporation v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

With regard to the parties' cross-motions for summary judgment relating to Bell's crossclaims and counterclaims, Bell objects to Magistrate Durkin's R&R on the following issues: (1) entry of judgment in favor of PUC and MCI, and against Bell, on Bell's request to prohibit MCI from collocating its remote switching modules ("RSMs") in Bell's central offices (Count I); (2) entry of judgment in favor of PUC and MCI, and against Bell, on Bell's request to reverse the PUC's decision to require Bell to sell MCI its directory publishing services at wholesale discount (Count II); and (3) remand of Bell's request to reverse the PUC's wholesale discount pricing decision applicable to MCI's resale of Bell services (Count III).

2. *PUC's Objections*

The PUC joins in Bell's Objections, with the exception of Magistrate Durkin's R&R as to Count I and II of Bell's Crossclaim. and Counterclaim. Additionally, PUC objects to the standard of review employed by Magistrate Durkin.

II. *Discussion*

The court will consider the portions of Magistrate Durkin's R&R to which objections were filed in turn.

A. *Standard of Review (PUC)*

Contrary to the PUC's current protestations, in his R&R, Magistrate Durkin identified the appropriate standard of review for evaluating the PUC's decision. It is well-settled

that a state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statues. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (citations omitted). Therefore, the PUC's interpretations of the Act are to be reviewed *de novo*. The PUC's factual determinations are, however, accorded a degree of deference; they are to be reviewed under a substantial evidence standard.[4] *Id.; see also Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266-67 (9th Cir. 2000). As such, the court rejects the PUC's objections to Magistrate Durkin's standard of review.

B. *Unbundling of Dark Fiber and Subloops*

The PUC and Bell initially objected to Magistrate Durkin's R&R on the issues of Dark Fiber and Subloop unbundling. However, the respective arguments on these issues have been mooted by the FCC's November 5, 1999 order[5] which addresses, inter all' a these very issues. *See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98, Third Report and Order (Rel. Nov. 5, 1999) (hereinafter "UNE Remand Order").

Specifically, with respect to subloop unbundling, the UNE Remand Order states that incumbent local exchange carriers ("incumbent LECs") "must provide unbundled access to

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[4] Magistrate Durkin indicated that "the PUC's Finding[s] of Fact are entitled to deference and must be reviewed under an arbitrary and capricious standard," citing *GTE South, Inc. v. Morrison*, 6 F. Supp.2d 517 (E.D. Va.1998). (R&R at 10.) The court notes, as did the Fourth Circuit in *GTE South, Inc.* that "there is no meaningful difference between [the arbitrary and capricious] standard and the substantial evidence standard." *GTE South, Inc.*, 199 F.3d at 745 n.5.

[5] The PUC and Bell filed their objections to the R&R and supporting briefs on October 19, 2000-before the FCC's order was released.

subloops nationwide, where technically feasible," *id.* ¶ 205, and that "lack of access to unbundled subloops at technically feasible points throughout the incumbent's loop plant will impair a competitor's ability to provide service that it seeks to offer." *Id.* ¶ 209. With regard to dark fiber, the UNE Remand Order states "dark fiber meets the statutory definition of a network element, and therefore is included within the definition of the dedicated interoffice transport network element," *id.* ¶ 326, and that "lack of access to unbundled interoffice transport impairs a carrier's ability to provide the services it seeks to offer." *Id.* ¶ 332.

Because the UNE Remand Order is binding upon the parties, the court need not evaluate the initial objections raised by Bell and the PUC to Magistrate Durkin's R&R on these issues. Indeed, the UNE Remand Order essentially moots the R&R in this regard. Nevertheless, the court will direct that judgment be entered consistent with the recommendations of Magistrate Durkin on these issues, albeit upon different grounds.

C. *Collocation of RSMs*

Bell initially objected to Magistrate Durkin's recommendation that judgment be entered against Bell on its request to overturn the PUC's decision to require that Bell permit MCI to collocate its remote switching modules ("RSMs") in Bell's central office. In so objecting, Bell contended that Magistrate Durkin applied the incorrect standard of review in affirming the PUC's decision insofar as he stated that "it was within the discretion of the PUC to permit collocation of RSMs." (R&R at 44.) To the contrary, Bell contended, Magistrate Durkin should have reviewed the PUC's decision *de novo*, because it was based upon a legal conclusion—*i.e.*, the interpretation of the word "necessary," as defined in the Act.

In response to Bell's objection, MCI points to a March 31, 1999 FCC order which addresses the collocation issue and, apparently, forecloses Bell's objections. *See In re: Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 4761 (1999) (rel. March 31, 1999), ¶ 28. Thus, in its reply brief, Bell appears to withdraw its objection on this issue, acknowledging that the FCC order cited by MCI is a currently binding regulation which Bell is obliged to honor. In addition to the FCC order cited by Bell, the court notes Bell's objections are also foreclosed by other FCC regulations. See 47 C.F.R. §§ 51.323(b), (c) (effective June 1, 1999).[6] In applying these new regulations in a case which post-dates the parties' briefs on the objections, the Fourth Circuit held that 47 C.F.R. § 51.323 plainly requires incumbent LECs to allow competing LECs to collocate RSMs and prohibits the incumbent from requiring that the switching functions of the RSMs be disabled. *See AT&T Communications of Virginia, Inc. v. MCI*, 197 F.3d 663, 669-70 (4th Cir. 1999).

Therefore, the court will adopt Magistrate Durkin's recommendation that the PUC's decision regarding collocation of RSMs be upheld, albeit upon different grounds. Accordingly, the court will direct that judgment be entered against Bell,

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[6] Pursuant to 47 C.F.R. § 51.323(b), "[a]n incumbent LEC shall permit the collocation of any type of equipment used or useful for interconnection or access to unbundled network elements." Further, § 1.323(c) provides, in relevant part, that:

> an incumbent may not place any limitations on the ability of requesting carriers to use all the features, functions, and capabilities of equipment collocated pursuant to paragraph (b) of this section, including, but not limited to, switching and routing features and functions.

47 C.F.R. § 51.323(c).

and in favor of the PUC and MCI, on Count I of Bell's Crossclaim. and Counterclaim.

D. *Unbundled Network Element Pricing*

The court now turns to the first of four issues in Magistrate Durkin's R&R over which considerable dispute remains: The PUC's decision regarding the pricing of unbundled network elements ("UNEs"). In its complaint (Count VI), MCI alleges that the PUC's pricing decision is violative of the Act insofar as the rates for UNEs must be based on forward looking economic costs and that the PUC's reliance upon Bell's cost studies was in error since those cost studies were not forward looking and included assumptions and inputs that are inconsistent with forward looking pricing, such as embedded costs and inefficiencies, costs associated with investment unrelated to providing local telephone service, and other inflated inputs that reflected monopoly pricing rather than forward looking costs. AT&T joined MCI in its attack on the PUC's pricing decision.

Magistrate Durkin recommends remanding the pricing issue to the PUC so that it may reconsider its pricing decision in accordance with the provisions of the FCC's recently revived regulations on this issue. *See* 47 C.F.R. §§ 51.501 *et seq*. In so recommending, Magistrate Durkin acknowledged that the aforementioned FCC pricing regulations were not in effect at the time of the PUC's decision (they had been vacated by the Eighth Circuit in a direct review action pursuant to the Hobbs Act, 28 U.S.C. § 2842(1)).[7] However, in light of the Supreme Court's decision reversing the Eighth Circuit's vacation of the FCC's pricing rules, *see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), Magistrate Durkin concluded that a remand is the appropriate course of

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[7] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir.1997), *rev'd in part*, 525 U.S. 366 (1999).

action to ensure that the PUC's pricing decision comports with the FCC's rules, and thus with the Act.

Bell and the PUC object to Magistrate Durkin's recommendation on this issue. Both objecting parties contend that the pricing methodology employed by the PUC was not inconsistent with the FCC's pricing rules, which require the use of the TELRIC [8] pricing methodology. Alternatively, Bell argues that even if the PUC's pricing methodology is inconsistent with TELRIC, it nevertheless complies with the Act-that is, the PUC is not bound by the FCC's pricing rules (*i.e.*, the requirement to employ the TELRIC methodology) because they were not binding at the time of the PUC decision. The court will address each of these objections separately.

Bell's contention that the PUC is not constrained by the FCC's regulation requiring use of the TELRIC pricing methodology is wholly unpersuasive. While it is undisputed that the FCC's regulations were stayed at the time of the PUC's decision, its decision is nevertheless subject to review for compliance with those regulations which were eventually upheld as valid by the Supreme Court. Generally, the Supreme Court's interpretation of a law "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harder v. Virginia Dept of Taxation*, 509 U.S. 86, 97 (1993). Contrary to Bell's arguments, there are no retroactivity concerns implicated by application of the FCC's pricing rules to the instant challenge. Indeed, this situation is directly analogous to one which the Fourth Circuit recently faced in the case of *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999),

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[8] TELRIC is an acronym for Total Element Long Run Incremental Cost, which is a term of art referring to the costs incurred to provide increased quantities of a service, above those already incurred to provide service, in response to increased demand over the long run. *See* 47 C.F.R. § 51.505.

wherein the court determined that "there [were] no retroactivity principles that prevent[ed] [it] from applying the FCC's pricing rules." *Id.* at 741. Accordingly the court rejects Bell's contention that the PUC was not bound by FCC's pricing rules and thus, the TELRIC methodology, in reaching its decision on the issue of UNE pricing.

The court next turns to the parties' arguments that the pricing methodology utilized by the PUC was not inconsistent with the FCC's TELRIC methodology and thus, violative of the Act. The PUC admits that it did not strictly comply with the TELRIC methodology, and instead employed a similar methodology known as TSLRIC.[9] Nevertheless, the PUC contends that the differences between TSLRIC and TELRIC are immaterial, and thus "[a] remand forfurther review on this esoteric point is not appropriate." (PUC Br. at 13.) Specifically, the PUC asserts that the principal distinction between TELRIC and TSLRIC lies in the calculation of forward looking common/joint costs,[10] and argues, in conclusory fashion, that "in practice, there may be no discernable difference at all." (*Id.*) For the reasons set forth below, the court finds such arguments unpersuasive.

The PUC's contention that its decision was in accordance with TELRIC is belied both by the FCC's express adoption of TELRIC and by the PUC's express adoption of TSLRIC. *See In re: Application of MFS Intelenet of Pennsylvania, Inc.*, Docket No. A-31023F0002, ("MFS III"), Order of April 10, 1997, at 20 (JA001641). Although the PUC stated that it found the FCC's pricing rules "to be instructive and a reasonable guide in determining a proper application of long-run

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[9] TSLRIC is an acronym for Total Service Long-Run Incremental Cost.

[10] Indeed, the PUC admits that the FCC has indicated that under the TELRIC method, "the amount of joint and common costs that must be allocated among separate offerings is likely to be much smaller . . . than a TSLRIC approach that measures the costs of conventional services." (*See* PUC Br. at 11 (citing the FCC's Local Competition Order at ¶ 678).)

incremental cost methodology," (*id.*), it disavowed them as not mandatory. (*Id.* at 13 (JA001634).) Thus, the PUC baldly asserted that the FCC's pricing rules were consistent with the TSLRIC methodology, which was utilized by the PUC (and proposed by Bell) in a previous proceeding, and that it was "not persuaded that the Hatfield study [sponsored by AT&T and MCI] offers a superior alternative to the Bell sponsored study." (*Id.* at 20 (JA 001641).) Indeed, in the absence of more than self-serving statements regarding TSLRIC's consistency with the FCC's pricing rules or possibility that TELRIC and TSLRIC do not differ in practice, the court is unpersuaded that the PUC's decision was appropriately based upon the TELRIC methodology set prescribed by the FCC's pricing rules. Therefore, the court agrees with Magistrate Durkin's recommendation that this issue be remanded to the PUC for reconsideration in light of the FCC's undisputedly governing pricing rules.

Despite the plain wording of the PUC's April 10, 1997 order and its admissions to the contrary, Bell curiously contends that the PUC did, in fact, utilize the TELRIC methodology. This argument, however, falls flat in the face of the admissions of the PUC discussed above. Accordingly, the court will adopt Magistrate Durkin's R&R as to this issue.[11]

E. *Interconnection: Access Tandem v. LATA*

Bell and the PUC object to Magistrate Durkin's recommendation to grant summary judgment in favor of MCI on its claim seeking reversal of the decision of the PUC, wherein

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[11] In further support of Magistrate Durkin's recommendation, the court notes that, as MCI points out, the PUC's "Global Order" issued September 30, 1999 appears to contradict several of the input cost factors used in the UNE pricing decision currently at issue. *See Joint Petition of Nextlink Penn., Inc.*, No. P-00991648 Opinion and Order, (entered Sept. 30, 1999). Therefore, for this reason, it also appears that a remand of the instant issue to the PUC for reconsideration in conjunction with the FCC's pricing rules is appropriate.

the PUC required MCI to interconnect with Bell's network in each access tandem serving area. Magistrate Durkin concluded that the PUC's decision to require interconnection at more points than requested by MCI is contrary to the provision of the Act prescribing interconnection, 47 U.S.C. § 251(c)(2)(B), and the corresponding regulations, 47 C.F.R. § 51.305. According to Bell and the PUC, because neither the Act nor the corresponding regulations proscribe a state commission from requiring interconnection at more than one access point per local access transport area ("LATA"), it was within the PUC's sole discretion to determine a minimum number of access points for interconnection. The court disagrees.

Magistrate Durkin's R&R contains a thorough, well-reasoned discussion of this issue. Clearly, the Magistrate adopted the interpretation of the Act proffered by MCI, and thus rejected the interpretation proffered by Bell and the PUC. Because the court agrees with the interpretation set forth by Magistrate Durlcin, further discussion is unnecessary.[12] Magistrate Durlcin's R&R will be adopted; therefore, the court will order that summary judgment be entered in favor of MCI, and against Bell and the PUC on Count V of MCI's complaint.

F. *Wholesale Discount: Directory Publishing, Services*

In Count II of its Crossclaim and Counterclaim, Bell seeks reversal of the PUC's decision to require Bell to provide MCI

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[12] The court notes Magistrate Durkin's conclusion on this issue has been bolstered by the affirmance of a decision upon which he relied: On October 8, 1999, the Ninth Circuit issued an opinion in *U.S. West Communications, Inc. v. MFS Intelenet*,193 F.3d 1112 (9th Cir 1999), affirming *U.S. West Communications, Inc. v. MFS Intelenet*, No. C97-222WD,1998 WL 350588 (W.D. Wash. January 7, 1998). Although the *MFS Intelenet* court does not address the instant issue directly, its affirmance implicitly undermines the rationale of the district court decisions cited by Bell—all of which are within the Ninth Circuit.

with certain directory publishing services at wholesale, rather than tariff (*i.e.*, retail) cost. Bell claims that the PUC incorrectly interpreted the term "telecommunication service," as defined in the Act, to encompass the provision of directory publishing services, thereby imposing upon Bell the duty to offer such services to MCI for resale at wholesale rates, pursuant to 47 U.S.C. § 251(c)(4)(A).[13] Magistrate Durkin agreed with the PUC's interpretation and therefore recommends that the PUC's decision be affirmed. Bell objects to Magistrate Durkin's recommendation, arguing, once again, that directory publishing services do not fit within the Act's definition of "telecommunication services."

The Act defines "telecommunications service" as follows: "the offering of telecommunications for a fee directly to the public, or to such classes or users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). In turn, the Act's definition of "telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Following the reasoning of the PUC, Magistrate Durkin interpreted the Act's definition of "telecommunications service" broadly,[14] and concluded that such services include directory publishing services. Magistrate Durkin appears, however, to have afforded too

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[13] Under the Act, an Incumbent LEC has "[t]he duty. . . to offer for resale at wholesale rates any telecommunications service that the tamer provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

[14] Magistrate Durkin cites the case of *U.S. West Communications v. MFS Intelenet*, No. 97-222,1998 WL 350588 (W.D. Wash. Jan. 7, 1998), for the proposition that "the definition of 'telecommunication service' is broad." (R&R at 46 (citing *MFS Intelenet* at *4).)

much deference to the PUC's decision,[15] and for the reasons set forth below, the court will reject his recommendation on this issue.

The court believes that the plain meaning of the Act's definition of "telecommunications service" cannot be stretched to include directory publishing services. The court first notes that Magistrate Durkin's citation to *MFS Intelenet* is misplaced. While that case does state that "[t]he definition of telecommunications services is broad," *id.* 1998 WL 3500588, at *4, its statement in no way supports the inclusion of directory listing services as within such definition. Contrary to the reasoning of the PUC and Magistrate Durkin, the court is unpersuaded that the inclusion of a subscriber's telephone number in the transmission path necessarily brings all "services provided in relation to that number" within the statutory definition of "telecommunications services." (R&R at 46.) As Bell pointed out in its objection to Magistrate Durkin's R&R, "[i]f Congress intended the wholesale discount to apply to any and all retail service included in the [incumbent LEC's] tariff, it would have said so." (Bell Br. at 12.)

The court is equally unpersuaded by the alternative ground upon which Magistrate Durkin concluded that directory listing services must be construed as "telecommunications services"—that the FCC's Local Competition Order [16] "expressly [holds] that the state commissions can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs." (R&R at 47 (citing Local Comp. Ord ¶ 872).) The court believes that

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[15] As explained in Section II(A)*supra*, the court must review the PUC's interpretation of the Act *de novo*. *See Morrison*, 199 F.3d at 745.

[16] *See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996) (hereinafter "Local Competition Order").

when the portion of the Local Competition Order relied upon by Magistrate Durkin is read in its entirety, it provides little support for the conclusion he reached. In the paragraph immediately preceding the one cited by Magistrate Durkin, the FCC emphasizes that "an [Incumbent LEC] must establish a wholesale rate for each retail service that: (1) *meets the statutory definition of 'telecommunication service*;' and (2) is provided at retail to subscribers who are not 'telecommunications carriers.'" *Local Competition Order* ¶ 871 (emphasis added). Indeed, the FCC declined to prescribe a minimum list of services that are subject to § 251(c)(4)'s resale requirement, but instead merely suggested a method for state commissions to use in determining whether a particular service should be offered at wholesale rates. Nevertheless, a state commission's determination of whether a service meets the statutory definition of "telecommunication service" is not entitled to deference, but is instead reviewed *de novo*. *See Morrison*, 199 F.3d at 745. Therefore, to the extent that Magistrate Durkin relied upon the PUC's determination on this issue, his recommendation is flawed.

Upon consideration of the statutory definition of "telecommunication service," the court believes that the PUC's and Magistrate Durkin's interpretation of is strained. The plain meaning of the Act cannot support the inclusion of directory publishing services as telecommunications services, and, therefore, the PUC erred by requiring Bell to provide such services to MCI at wholesale for this reason. Therefore, the court will reject Magistrate Durkin's recommendation on this issue, and enter summary judgment in favor of Bell and against MCI and the PUC on Count II of Bell's Crossclaim and Counterclaim.

G. *Wholesale Discount Pricing Applicable to MCI's Resale of Bell Services*

In Count III of its Counterclaim/Crossclaim, Bell seeks to reverse the PUC's decision regarding the wholesale discount

rate applicable to MCI's resale of Bell's services. Magistrate Durkin concluded that because the Eighth Circuit is currently considering the merits of the FCC's wholesale discount pricing rules on remand from the Supreme Court,[17] this issue should be remanded to the PUC for reconsideration of its decision following the Eighth Circuit's decision.

It is undisputed by the parties that the PUC's decision with regard to wholesale pricing is consistent with the FCC regulations. However, Bell maintains that the FCC regulations are contrary to the Act. Because Bell's argument goes to the very issue which sits before the Eighth Circuit on remand, Bell seeks to have the decision in the instant case held in abeyance pending the Eighth Circuit's ruling. The remaining parties oppose this request and thus also oppose Magistrate Durkin's, recommendation, arguing that such action is improper in light of the fact the PUC's decision is undisputedly consistent with the FCC's currently binding regulations. The court agrees.

Clearly, to the extent that Bell seeks to challenge the substantive provisions of the FCC regulations governing this issue, it is not a proper action before this court. *See Morrison*, 199 F.3d at 743 (acknowledging that the Eighth Circuit has been assigned as the sole forum to hear the petitions for review of FCC regulations, pursuant to 28 U.S.C. § 2112(a)). Thus, at this point, Bell's claim appears to be premature. Because Bell admits that the PUC's decision is consistent with the FCC regulations, it cannot maintain a claim against the PUC for violating the Act on the basis that the regulations may, at some point in the future, be vacated.

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[17] As indicated by Magistrate Durkin, the Supreme Court ruled on the jurisdictional issue regarding the FCC pricing rules, but declined to address the challenges to the merits of the rules. *See Iowa Utilities Bd.*, 525 U.S. 366. Instead, the case was remanded to the Eighth Circuit for consideration of the merits. *See id.* To date, the Eighth Circuit has not issued and opinion.

Moreover, the court is unconvinced that holding the instant issue in abeyance pending the Eighth Circuit's decision will serve a useful purpose. Indeed, regardless of the Eighth Circuit's holding, the issue of whether the regulations comport with the Act is likely to remain unresolved until it is finally considered by the Supreme Court. Thus, the court believes that issuing a ruling on Bell's claim in light of the existing law is appropriate—particularly in light of Congress's intent that competition under the [Act] take root 'as quickly as possible.'" *Morrison*, 199 F.3d at 744 (quoting H.R.Rep. No. 104-204 at 89 (1995)). Facing a similar question, the Fourth Circuit recently declined to hold an appeal from a state commission ruling in abeyance, stating that:

> [w]ithholding our decision until the Eighth Circuit and (perhaps) the Supreme Court review the validity of the FCC's rules could result in a considerable delay. Issuing the opinion without delay is consistent with Congresses' express policy to bring about competition quickly m the local telephone markets.

*Id.* Accordingly, the court will reject Magistrate Durkin's recommendation on this issue, and enter summary judgment against Bell, and in favor of MCI and the PUC on Count III of Bell's Crossclaim and Counterclaim.

III. *Conclusion*

In accordance with the foregoing discussion, the court will adopt in part and reject in part the Report and Recommendation issued by Magistrate Judge Durkin. With regard to MCI's claims, the court will direct that judgment be entered as follows: in favor of MCI, and against Bell and the PUC, on Counts III, IV, V, and VI; and in favor of

AT&T on Count VI.[18] With regard to Bell's crossclaims and counterclaims, the court will direct that judgment be entered as follows: in favor of MCI and the PUC, and against Bell, on Counts I; in favor of MCI, the PUC, and AT&T on Count III; and in favor of Bell, and against MCI and the PUC, on Count II. An appropriate order will issue.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: June 30, 2000.

[18] The court notes that conspicuously absent from the parties' summary judgment briefs is argument as to Count II of MCI's complaint, although MCI and Bell purportedly moved for summary judgment as to all counts in MCI's complaint. Although a review of the docket does not reveal that this Count was dismissed, because the parties have apparently dropped this issue, the court will deem Count II of MCI's complaint withdrawn.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
[Filed Nov. 5, 1998]

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Civil Action No. 1:CV-97-1857
(Judge Caldwell)
(Magistrate Judge Durkin)

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MCI TELECOMMUNICATIONS CORP.,
*Plaintiff,*

vs.

BELL ATLANTIC-PENNSYLVANIA, INC., *et al.*,
*Defendants.*

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ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

In this case, the plaintiff MCI seeks review of determinations of the defendant, the Pennsylvania Public Utility Commission (PUC), regarding an agreement between MCI and defendant Bell Atlantic-Pennsylvania, Inc., for entry of MCI into the local telephone market. Our jurisdiction over the controversy is under The Telecommunications Act of 1996. *See* 47 U.S.C. § 252(e)(6).

The PUC defendants filed motions to dismiss the complaint against them and a crossclaim filed by defendnat, Bell Atlantic-Pennsylvania. The motions raised the tenth and the eleventh amendments, as well as a commerce-clause challenge to the Act.

The magistrate judge has filed a report recommending that the PUC's motions to dismiss be denied, and we are considering the objections to the report, the principal one being that the magistrate judge did not adequately cover the coercive aspect of the Act in light of the tenth amendment.

As to the tenth and eleventh amendment challenges, they can be disposed of by reference to *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998), and cases cited therein.

In connection with the commerce-clause challenge to the Act, we are not satisfied by the conclusional challenge made by the defendants. Congress can regulate intrastate commerce as ion as that commerce substantially affects interstate commerce. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). Thus, simply because intrastate telephone connections were always traditionally regulated by the states does not mean that Congress could not exert commerce-clause power over them.

Upon review of the Report of the United States Magistrate Judge, filed on August 11, 1998, and full consideration of the exceptions thereto filed by the defendants, the Pennsylvania Public Utility Commission and its members, for the reasons stated in the Report by Magistrate Judge Durkin we agree the motions to dismiss filed by said defendants should be denied, and we adopt the reasoning and conclusions of the Report and Recommendation.

Accordingly, this 5th day of November, 1998, it is ordered that:

1. The motions to dismiss of the PUC and its member (doc. 7 and 19) filed against the plaintiff's complaint and the crossclaim of defendant, Bell Atlantic-Pennsylvania, are denied.

2. This case is remanded to the Magistrate Judge for further proceedings.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Aug 11, 1998]

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Civil Action No. 97-1857
(Caldwell, J.)
(Durkin, M.J.)

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MCI TELECOMMUNICATIONS CORP.,
*Plaintiff,*

v.

BELL ATLANTIC-PENNSYLVANIA, INC., *et al.*,
*Defendant.*

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## REPORT AND RECOMMENDATION

Before the court is a motion by the defendants, Pennsylvania Public Utility Commission and its members, to dismiss the complaint for lack of personal jurisdiction, and a motion by the same defendants to dismiss the crossclaim of defendant Bell Atlantic-Pennsylvania, Inc., against them. (Doc. Nos. 7 and 19).

By way of background, The Telecommunications Act of 1998, 47 U.S.C. §§151, *et seq.*, (hereinafter "The Act" or "TA—1996") (Attached as Appendix B) seeks to promote telecommunications services throughout the nation by competition. Interexchange Carriers ("IXCs"), such as MCI, are expected to enter the local markets of Local Exchange Carriers ("LECs") as Competitive Local Exchange Carriers ("CLECs"). Interconnection agreements, arrived at through negotiation and arbitration, play an important part in

promoting that competition. These agreements generally govern the prices, terms, and conditions under which a specific CLEC accesses an ILEC's network.

Sections 252 (a) (2) and (b)) (1)-(4) of the Act authorize state commissions to conduct negotiations, mediations, and arbitration proceedings to facilitate and to resolve any terms, prices, or conditions that a specific CLEC and an ILEC are unable to resolve themselves. Thereafter, the CLEC and ILEC are required to submit the final interconnection agreement (contract) to the state commission for approval under Section 252(e). Section 252 (e) (6) authorizes the judicial review of state commission actions approving any interconnection agreement.

Throughout 1996, plaintiff MCI Communications Corporation and MCI Metro Access Transmission Services, Inc. ("MCI") and Bell Atlantic-Pennsylvania, Inc. ("Bell-Atlantic") engaged in a lengthy, negotiation in an attempt to reach an interconnection agreement. On August 30, 1996, MCI sought compulsory arbitration of unresolved issues before the Pennsylvania Public Utility Commission (PUC). Hearings were held in October 1997 and briefs were submitted by MCI and Bell Atlantic.

On December 20, 1996, the PUC issued a final opinion and order disposing of the arbitration proceedings (December 1996 Order). The December 1996 Order required the submission of an interconnection agreement reflecting the PUC's determinations in the December Order. The December Order also required incorporation of the Commission's determinations in the related proceeding at PaPUC Docket No. A-310203F0002 (the "MFS Phase III" proceeding)

concerning the prices for unbundled network elements ("UNEs") [1] under litigation in that proceeding.[2]

The parties later filed a Joint Application for Approval of an interconnection agreement using the MFS Phase III Interim Rate Order rates. However, the parties could not agree on the appropriate Interconnection Point (IP) for the Philadelphia and Pittsburgh LATAs.[3] The parties requested the Commission to approve the interconnection agreement and determine the number of Ips for the LATAs.

On September 3, 1997, the PUC entered an Order (September 1997 Order) approving the interconnection agreement on the condition that the final rates would be those established by the MFS Phase III Proceeding. The September 1997 Order also adopted Bell's proposed language on the number of IPs. A Secretarial Letter issued on November 14, 1997 deeming the September 1997 Order to be final.

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[1] The three methods to attain some of the goals of the Act are, generally, interconnection, resale, and facilities-based competition. Under interconnection, a CLEC negotiates with an ILEC to obtain the UNEs needed to provide competitive local exchange service to end-user customers through a combination of CLEC-owned components and those secured from the ILEC. Under resale, the CLEC purchases the retail services of an ILEC, at a pre-determined discount established by a state commission, for resale to an end-user customer. Under facilities-based competition, a competitor builds the telephone network needed to provide competitive services to end-users.

[2] MCI and Bell were parties to the MFS Phase III proceeding. On April 10, 1997, the PUC issued an order establishing interim rates (MFS Phase III Interim Order). On August 7, 1997, the PUC issued a final order establishing final rates (MFS Phase III Final Order).

[3] Interconnection Point (IP) is a term of art that refers to the physical connection between two competing carriers. In this case, MCI and Bell disputed the number of points serving the Philadelphia and Pittsburgh areas. MCI thought one point was sufficient whereas Bell wanted at least two.

On December 8, 1997, MCI filed this action against the PUC and its commissioners in their official capacities, and against Bell Atlantic challenging a number of the PUC's determinations which the PUC ordered MCI and Bell Atlantic to include in the interconnection agreement which MCI contends are violative of the Act. The PUC defendants filed a motion to dismiss the complaint for lack of personal jurisdiction. Bell Atlantic filed an answer to the complaint which included a counterclaim against MCI and also filed a crossclaim against the other defendants, also contending that certain actions of the PUC violated the Act. MCI then moved to dismiss Bell Atlantic's crossclaim.

Turning first to the PUC's motion to dismiss the complaint, the documents related to that motion are the PUC's supporting brief and exhibits (Doc. Nos. 8 and 9) ; MCI' s opposing brief (Doc. No. 18), the PUC's reply brief related to both the motion to dismiss, the complaint as well as the motion to dismiss Bell Atlantic's crossclaim (Doc. No. 25); an opposing brief by Intervenor United States in opposition to PUC's motion to dismiss the complaint on' constitutional grounds (Doc. No. 35); MCI's surreply in opposition to defendant's motion to dismiss which addresses the constitutional arguments raised in the PUC's reply brief (Doc. No. 42) and MCI's notice of supplemental authority. (Doc. No. 52).

A central element of the 1996 Act is the introduction of competition into local service markets pursuant to agreements negotiated in accordance Sections 251 and 252 of the Act. Section 251 of the Act imposes a variety of obligations upon incumbent local telephone companies requiring them to provide access to their facilities to new entrants with the aim of hastening the growth of competition in their markets, by permitting other telecommunications carriers to interconnect with the incumbent, thereby allowing calls to carry between an incumbent's network facility and those of a competitor; by

providing other carriers access to elements of the incumbent's local network on an "unbundled" basis, thereby permitting a prospective competitor to repackage elements to be offered to the public as a competitive service; and by selling to other carriers, at wholesale rates, any telecommunications service that the incumbent provides to its retail customers. 47 U.S.C. §251(c). Section 251 also requires incumbent exchange carriers to provide physical access to their poles, ducts, conduits and rights of way to allow other carriers to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. §251(b) (4) and 251(c)(6).

Sections 251 and 252 impose a duty on incumbent local exchange carriers to negotiate in good faith with new entrants to arrive at the terms and conditions of agreements regarding facilities' access, interconnection, resale of services, or any of the other arrangements contemplated by the Act. 47 U.S.C. §251(c), 252. Section 252 provides that the parties may enter into voluntary agreements that become effective upon approval by the responsible state public service commission, or, failing negotiation of a voluntary agreement, that any party to such a negotiation "may petition a state commission to arbitrate any other issues." 47 U.S.C. §252(c). The 1996 Act permits any party "aggrieved" by a determination of a state commission to bring an action in federal district court to determine whether the agreement or statement meets the requirements of Section 251 and Section 252. 47 U.S.C. §252(e)(6).

Although Congress might have preempted the regulatory role under the Act, it gave the states, through their commissions the right to participate in this regulatory role, perhaps on the basis that the states had traditionally participated in the regulation of facilities. However, the Act plainly permits state commissioners to opt out of their regulatory role. If a state declines to accept the regulatory role

contemplated by the statutes, its duties are assumed by the FCC, 47 U. S. C. § 252(e)(5), and there is no judicial relief against the state commissioners' decision to opt out. 47 U.S.C. § 252(e)(6). Review of the FCC's actions in such cases would constitute the sole avenue of judicial redress. *See Id.*, 47 U.S.C. § 402(a); 28 U.S.C. § 2342(2). However, if the commission decides to accept the regulatory role, then as noted above, any party aggrieved by a decision of a state commission may bring an action in federal district court to determine whether the agreement or statement meets the requirements of the Act.

It is this provision for review in a federal court of the commission' s actions which forms the basis for the PUC' s contention that a federal court lacks jurisdiction to review the commission's actions. The PUC argues that the Eleventh Amendment bars suits against an unconsenting state, and an arm of that state such as the PUC, by its own citizens as well as those citizens of another state. The PUC argues that Pennsylvania has not consented to this suit by MCI, a citizen of Delaware and doing business in Pennsylvania and thus the action should be dismissed. In its reply brief, the PUC argues that Section 252(e)(4) to (e)(6) of the Act are unconstitutional because they exceed Congress' powers under the Commerce Clause and also that the Tenth Amendment which reserves to the states the powers not delegated to the United States by the Constitution prohibits Congress' attempt to "commandeer the Commonwealth's legislative and executive functions" by forcing it to waive its sovereignty in order to implement the federal regulatory program of the Act.

However, as the briefs of MCI, the United States and indeed Bell Atlantic in connection with a identical attack on the crossclaim, clearly demonstrate, all of the courts that have addressed the Eleventh Amendment issue have held that the Eleventh Amendment does not bar district court review of state decisions under Section 252 of the Telecommunications

Act either because suit can properly be brought against state officials, such as the commissioners here, for prospective injunctive relief without regard to the Eleventh Amendment, ex Parte Young, 209 U.S. 123 (1908), or because the Act does not impose an obligation on the states, the performance of which is subject to federal court review, but rather offers state regulatory bodies the option of participating in the federal system for regulation of private conduct and only then subjects their determinations to review in the district court, and that in accepting regulatory authority under the Act in full knowledge of the attendant judicial review provisions, Pennsylvania has waived any Eleventh Amendment protections. The briefs of MCI, the United States and indeed, Bell Atlantic, also contain a host of authority that Sections 252(e)(4) to 252(e)(6) of the Act do not exceed Congress' commerce power nor do they violate the Tenth Amendment. Although PUC also argues that the complaint against the individual commissioners should also be dismissed pursuant to the Eleventh Amendment, the opposing briefs clearly establish that any relief here would be prospective injunctive relief, directing the individual commissioners to implement properly the Telecommunications Act in approving the interconnection agreement at issue, and that therefore relief of the nature contemplated against individual officials is wholly consistent with the *ex Parte Young* exception to Eleventh Amendment immunity.

The PUC attempts to avoid this host of authority set forth in the opposing briefs, which have considered and rejected the PUC's various arguments, by culling from various cases language which it feels would support its position or by attempting to distinguish the authorities. However, the briefs of the parties demonstrate that these attempts are without merit.

At oral argument, the PUC offered brief argument in reply. Although recognizing that every one of a great number of

courts when faced with these various issues has rejected the PUC's position, the PUC's reply was that these issues have not been authoritatively decided by the Third Circuit or by the Supreme Court of the United States and therefore the PUC is certainly not precluded from advancing the same arguments. Thus, it appears that the PUC's intent in filing these motions is more to preserve the record so that these issues may be revisited in the future, perhaps by the Third Circuit or the Supreme Court. Under these circumstances, it would only unduly lengthen this report to set forth the many cases that have rejected these very arguments and with which the magistrate judge agrees. Suffice it to say that the opposing briefs establish that the review of the PUC's actions is not barred by the Eleventh Amendment, the Commerce Clause, or the Tenth Amendment. Indeed, subsequent to oral argument, MCI provided the court with even more authority through May 27, 1978 which supports its position in opposition to the motion of the PUC and its commissioners to dismiss the complaint.(Doc. No. 52)

Since the motion of the PUC to dismiss Bell Atlantic's crossclaim is based on the same arguments directed at the MCI complaint, the motion to dismiss the crossclaim should similarly be denied.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT:

the motion by the defendants PUC and its commissioners to dismiss the complaint be denied and the motion by the same defendants to dismiss the Bell Atlantic crossclaim be denied.

/s/ Raymond J. Durkin
RAYMOND J DURKIN
United States Magistrate Judge

Dated: August 10, 1998

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed August 3, 2000]

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Civil Action No. 99-5391

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BELL ATLANTIC-PENNSYLVANIA, INC.,
*Plaintiff*,

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Defendants*.

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MEMORANDUM AND ORDER

Katz, S.J.

Now before the court is the motion to dismiss submitted by defendants the Pennsylvania Public Utility Commission (PUC) and Commissioners John M. Quain, Robert K. Bloom, Nora Mead Brownell, and Aaron Wilson, Jr., as well as the motion for judgment on the pleadings submitted by intervening state senators Vincent J. Fumo, Roger A. Madigan, and Mary Jo White. The motions seek dismissal of this action on the grounds of Eleventh Amendment immunity or, in the alternative, abstention in light of ongoing state court proceedings. In addition, the motions seek to dismiss as untimely the crossclaims of intervenors MCI WorldCom Network Services, Inc. and MCImetro Access Transmission Services, LLC (collectively, Worldcom), and the crossclaims of intervenors AT&T Communications of Pennsylvania, Inc., TCG Pittsburgh, and TCG Delaware Valley, Inc. (collectively, AT&T). Finally, the motions seek dismissal of counts

four and five of plaintiff Bell Atlantic-Pennsylvania's (Bell) complaint, as well as part of Worldcom & AT&T's claims, for failure to state a claim upon which relief can be granted.[1]

Additional intervenors in this action are Sprint Communications Company and the United Telephone Company of Pennsylvania (collectively, Sprint), and the United States. Sprint did not take a position on either motion. The United States intervened for the purpose of defending the constitutionality of the Telecommunications Act of 1996 (TCA).

I. Background

A. Telecommunications Act of 1996

This case involves the provisions of TCA that seek to foster competition in local telecommunications services[2]. *See* 47 U.S.C. §§ 251-52.

> Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying

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[1] The senators' motion fully incorporates the PUC and the Commissioners' motion to dismiss and makes no additional arguments. Accordingly, the court will not address the senators' motion separately; all references in this memorandum to the motion to dismiss, and the arguments therein, also encompass the senators' motion.

[2] "It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp Iowa Utils. Bd.*, 525 U.S. 366, 397, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999).

> calls between switches) that constitute a local exchange network.

*AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Bell, the plaintiff, is an incumbent LEC.

The TCA attacks the regulatory protections that sheltered local telephone monopolies by "preempting all state and local legal barriers to entry into the local telephone market," including the state-sanctioned exclusive franchises formerly enjoyed by incumbent LECs. *Bell Atlantic-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 222 (D. Del. 2000) (citing 47 U.S.C. § 253(a)). Through sections 251 and 252, TCA also attempts to alleviate economic barriers, recognizing that an incumbent LEC's network provides it with a competitive advantage because the cost of constructing a new, wholly redundant network is generally prohibitive. *See, e.g., id.; MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 2000 U.S. App. LEXIS 17739, 2000 WL 1010863, at *2 (7th Cir. 2000). To that end, the TCA subjects incumbent LECs to "a host of duties intended to facilitate market entry" including "the LEC's obligation under 47 U.S.C. §251(c) . . . to share its network with competitors." *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c) provides three ways a competitor can gain access to an incumbent LEC's network: "It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'[3]; and it can interconnect its own facilities

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[3] Access to unbundled network elements allows competitors who do not have a fully redundant network to "fill in the gaps of their own network by purchasing pieces" of an incumbent LEC's network. *McMahon*, 80 F.Supp.2d at 223. "These pieces are known as 'unbundled network elements' or 'UNEs.'" *Id.*

with the incumbent's network."[4] *Id.* The TCA also requires an incumbent LEC to allow a competitor to collocate "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. §251(c)(6).

The Act requires that an incumbent LEC and any competitor negotiate an agreement in good faith. *See* 47 U.S.C. § 251(c)(1). During these negotiations, any party may request the state commission that regulates telephone services to mediate. *See id.* § 252(a)(2). In the event that the negotiations fail, the TCA provides that either party may petition the state commission to arbitrate any open issues. *See id.* § 252(b). An agreement encompassing the access methods detailed in section 251(c), whether arrived at privately or through compulsory arbitration, must be approved by the state commission. *See id.* § 252(e)(1). The TCA limits the grounds under which a commission may reject an agreement under federal law and regulations, *see id.* § 252(e)(2), while preserving a state's authority to impose additional conditions that do not conflict with federal law. *See id.* § 252(e)(3) (stating that, notwithstanding section 252(e)(2) but subject to 47 U.S.C. § 253, "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement[.]"). If a state commission fails to act under section 252, the Federal Communications Commission (FCC) will preempt the state commission's jurisdiction and responsibilities over the access agreements[5]. *See id.* § 252(e)(5); *see generally Illinois Bell*,

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[4] "Some competitors, such as cable companies, . . . have existing networks of their own that enable their subscribers to communicate with each other. . . . [However,] a fair agreement with the [incumbent LEC] will be required to enable the new entrant's customers to place calls to, and receive calls from, the [incumbent LEC's] subscribers." *McMahon*, 80 F. Supp. 2d at 223.

[5] A state commission fails to act when it does not respond within a reasonable time to a request for mediation or arbitration or does not complete an arbitration within a specific time period. *See Illinois Bell*, 222

222 F.3d at 329, 2000 WL 1010863, at *2-3 (detailing section 252's procedural scheme); *MCI Telecomm. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *3 (10th Cir. June 20, 2000) (same).

"In any case in which a State commission makes a determination under . . . [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements" of sections 251 and 252. 47 U.S.C. § 252(e)(6). Moreover, "no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement" under section 252. *Id.* § 252(e)(4).

B. The Parties' Challenges to the PUC's Global Order

At the heart of this action is an Opinion and Order entered by the PUC on September 30, 1999 (Global Order). In the Global Order, the PUC addressed the "several interrelated dockets implementing state and federal telecommunications policy in the Commonwealth of Pennsylvania." Global Order at 2 (Compl. Ex. 1). The PUC undertook the proceedings that culminated in its Global Order upon concluding that its previous system of separately adjudicating individual telecommunications cases did not lead to "satisfactory and prompt resolution" of the morass of issues raised by federal and state law mandates to provide consumers with competitive local telecommunications services. *Id.*

The PUC first attempted to settle the outstanding issues by negotiation, but this method failed. Two competing petitions were then filed before the Commission—one supported by Bell and others, and the second supported by Worldcom; A&T; Senators Fumo, Madigan, and White; and others. The

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F.3d at 329, 2000 WL 1010863, at *3 (citing 47 C.F.R. § 51.801(b)). "A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits." *Id.* (citing 47 C.F.R. § 51.801(c)).

Global Order resolved the issues raised by the two petitions, as well as the pending interrelated dockets that were consolidated for that purpose.

The action before this court alleges that several aspects of the Global Order violate federal law[6]. Bell, Worldcom, and AT&T all contend that rates for unbundled network elements (UNE) set by the Global Order violate the TCA[7]. An order entered by the PUC on August 7, 1997, first set permanent rates for access to Bell's UNEs after a proceeding before the Commission commonly referred to as MFS-Phase III. "Numerous, subsequent agreements" incorporated the rates set by the MFS-Phase III Order. Compl. ¶ 22. The Global Order rates replace the MFS-Phase III rates.

Bell also challenges the PUC's authority under federal law to require it to provide unbundled access to switching throughout Pennsylvania and to provide unbundled access to digital subscriber line access multiplexers (DSLAMs)[8]. Bell contends it should not be required, under federal law and regulations, to make these network elements available because failure to provide them would not impair a competitor's ability to provide services and because they are not necessary for a competitor to provide service. In addition, it contends that the PUC failed to engage in the analysis required by the TCA in determining that Bell make these elements available on an unbundled basis.

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[6] As noted *infra*, these and other aspects of the Global Order are being challenged in state court proceedings as well.

[7] In addition, AT&T alleges that the PUC's decision to allow Bell to maintain rates in excess of just and reasonable levels for an additional period of up to one year violates the TCA and federal regulations.

[8] DSLAMs are "devices that allow users to transmit data and voice communications simultaneously over high-speed digital lines." Bell Mem. in Opp. at 4-5.

Finally, Bell challenges the discount wholesale rates for retail services set by the Global Order. While the wholesale discount rates set by a previous PUC decision are generally unaffected, the Global Order increases for one year the discount rate Bell may charge its competitors for retail services in less populated areas of the Commonwealth as part of a "Rural/Residential Promotion."

Bell brings its claims pursuant to the TCA, 42 U.S.C. § 1983, and 22 U.S.C. § 2201(a), and seeks declaratory and injunctive relief. AT&T and Worldcom bring their claims pursuant to the TCA and seek declaratory and equitable relief.

C. Other Proceedings

Two other proceedings are relevant to this action. The first is a challenge by Bell to the Global Order in state court. That action includes the federal claims asserted here, as well as state law claims regarding other aspects of the Global Order. Numerous parties, including most of the intervenors in this action, are participating in the state action. Bell contends that it raised the federal claims in the state court solely as a protective measure; in its petition for review before the Commonwealth Court, it reserved the federal claims pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964)[9].

The second proceeding was a case in the Middle District of Pennsylvania, *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, Inc.*, No. 1:CV-97-1857. Worldcom brought that action, pursuant to the TCA, to challenge an

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[9] An *England* reservation allows a party who has been forced to litigate in state court to reserve its federal claims for federal adjudication. The party informs the state court of the nature of the federal claims, that it does not wish to litigate those federal claims in the state court, and that the party intends, should the state court rule against it on the questions of state law, to return to federal court for disposition of the federal claims. *See Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990).

interconnection agreement with Bell that had been approved by the PUC. That agreement incorporated the UNE rates set by the MFS-Phase III Order. *See id.*, Report and Recommendation, at 3 (M.D. Pa. Aug. 10, 1998) (Worldcom's Brief in Opp. to Mot. to Dismiss, Ex. 8)[10]. The Middle District court held that the PUC was not immune under the Eleventh Amendment, see id., Order (M.D. Pa. Nov. 5, 1998) (Worldcom's Brief in Opp. to Mot. to Dismiss, Ex. 9), and, on June 30, 2000, it denied both the PUC's motion to certify its decision on immunity for interlocutory appeal,[11] *see id.*, Mem. and Order (M.D. Pa. June 30, 2000) (PUC's Reply Brief, Ex. 1), and decided the action on the merits, *see id.*, J. and Mem. (M.D. Pa. June 30, 2000) (Worldcom's Resp. in Opp. to the Mot. for J. on the Pleadings, Ex. 1). On July 20, 2000, Bell filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60 in light of a recently issued decision by the Eighth Circuit that vacated portions of the FCC regulations upon which the Middle District Court relied. *See* Bell's Mot. for Relief from J. Pursuant to Fed. R. Civ. P. 60 and Request for Expedited Consideration (attached to this court's Order of July 24, 2000); *see also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 2000 U.S. App. LEXIS 17234, 2000 WL 979117 (8th Cir. 2000). That motion was denied. *See MCI Telecomm.*, Civ. No. 1:CV-97-1857, Mem. and Order (M.D. Pa. July 25, 2000).

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[10] The magistrate judge's report and recommendation was adopted by the district court. *See MCI Telecomm. Corp. v. Bell*, No. 1:CV-97-1857 (M.D. Pa. Nov. 5, 1998) (Worldcom's Brief in Opp. to Mot. to Dismiss, Ex. 9).

[11] Notwithstanding the PUC's motion, a district court's denial of a claim of Eleventh Amendment immunity is immediately appealable. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 147, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 325 (3d Cir. 1999).

II. Discussion

A. Standard of Review

Because this action is brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the court's standard of review varies. In evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court generally considers only the allegations in the pleadings. *See, e.g., Halstead v. Motorcycle Safety Found., Inc.*, 71 F. Supp. 2d 464, 467 (E.D. Pa. 1999). However, matters of public record, orders, and exhibits attached to the complaint may also be considered. *See id.* The court must accept as true all factual allegations in the complaint, as well as all reasonable inferences that can be drawn therefrom, and construe them in the light most favorable to the plaintiff. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). Dismissal under Rule 12(b)(6) is only appropriate where there is no set of facts that could be proved upon which relief could be granted. *See id.*

On the other hand, the standard to be applied to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) depends on whether the defendant makes a facial or factual challenge. *See Halstead*, 71 F. Supp. 2d at 468. Under either approach, it is generally the plaintiff's burden to prove that jurisdiction exists. *See id.* However, in a facial challenge, where the allegations of jurisdiction in the complaint are disputed, "the factual allegations of the complaint are presumed to be true and the complaint is reviewed to ensure that each element necessary for jurisdiction is present." *Id.* Where the challenge is factual, "any evidence may be reviewed and any factual disputes resolved regarding the allegations giving rise to jurisdiction[.]" *Id.*

The Eleventh Amendment is a jurisdictional bar and may be raised by a motion to dismiss. *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n.2 (3d Cir. 1996). The

doctrine of abstention allows a court to decline to exercise its jurisdiction, *see, e.g., Kentucky W. Va. Gas Co. v. Pennsylvania PUC*, 791 F.2d 1111, 1114 (3d Cir. 1986), and may also be raised by a motion to dismiss. The court concludes that invocation of the Eleventh Amendment constitutes a facial challenge to its jurisdiction, requiring the court to accept as true the factual allegations in the complaint, while invocation of abstention doctrines constitutes a factual challenge, allowing the court to conduct a wider inquiry.

B. Eleventh Amendment

The PUC[12] first seeks dismissal of this action on Eleventh Amendment grounds. That amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although by its literal terms the Eleventh Amendment only prohibits suits against a state by citizens of another state or of a foreign state, the Supreme Court has held that the amendment applies to suits brought against a state by its own citizens, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), and to suits involving state agencies. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993).

State sovereign immunity under the Eleventh Amendment is not, however, absolute, as the Tenth Circuit explained:

> First, a state may not assert an Eleventh Amendment defense where Congress has properly abrogated its immunity. Second, a state may waive its sovereign immunity by consenting to suit in federal court. Third, a

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[12] Unless otherwise indicated, any further references to the PUC encompass both the Commission and the individual Commissioners.

private party may sue a state officer for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws.

*Public Serv. Comm'n*, 216 F.3d 929, 935, 2000 U.S. App. LEXIS 14348, at *12, 2000 WL 783382, at *4 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999); Ex parte Young, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908); Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)). In *Seminole Tribe*, the Supreme Court held that Congress may only abrogate a state's sovereign immunity when it acts pursuant to its powers under the Fourteenth Amendment. See 517 U.S. at 59, 72-73; *see also College Sav. Bank*, 527 U.S. at 670. Because Congress passed the TCA pursuant to its Article I powers under the Commerce Clause, *see Bell Atlantic-Del. v. Global NAPS S.*, 77 F. Supp. 2d 492, 498 (D. Del. 1999), the parties opposing the motion to dismiss rely on the second and third means of avoiding Eleventh Amendment immunity, arguing that the Commonwealth waived its immunity and that this suit may proceed against the Commissioners under the *Ex parte Young* doctrine.

1. Waiver

Although the constructive waiver doctrine has been severely limited by *College Savings Bank*, the court is persuaded by the decisions of the Seventh and Tenth Circuits that a gratuity constructive waiver is still a viable means by which a state can waive its sovereign immunity. *See Illinois Bell*, 222 F.3d at 339, 2000 WL 1010863, at *13-18; *Public Serv. Comm'n.*, 216 F.3d 929, 935-36, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *5-8. In *College Savings Bank*, the Court overruled *Parden v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184, 12 L. Ed. 2d 233,

84 S. Ct. 1207 (1964), declaring that "the constructive-waiver experiment of Parden was ill conceived. "*College Sav. Bank*, 527 U.S. at 680. *Parden* involved a provision of the Federal Employer's Liability Act (FELA) that allowed suit in federal court for violations of the Act against every carrier engaged in interstate commerce. The Supreme Court held that this provision permitted a federal suit against Alabama because the state had chosen to operate a railway system in interstate commerce, thus waiving its sovereign immunity. *See* 377 U.S. at 192. Similarly, *College Savings Bank* involved the Trademark Remedy Clarification Act, which provided that a state could be sued in federal court for false and misleading advertising in interstate commerce. *See* 527 U.S. at 670. In *College Savings*, however, the Court rejected the argument that Florida had constructively waived its immunity by choosing to engage in an otherwise lawful activity that was regulated by federal law: "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *Id.* at 680.

Several courts, including the Seventh and Tenth Circuits, when considering the question of waiver post-*College Savings Bank*, have relied on language in that opinion suggesting that gratuity constructive waivers have not been foreclosed. *See, e.g., Illinois Bell*, 222 F.3d at 340, 2000 WL 1010863, at *13-18; *Public Serv. Comm'n.*, 216 F.3d 929, 935, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *5-8; AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999); *Global NAPS S.*, 77 F. Supp. 2d at 498-500. Under this theory, if Congress offers the states a gift or gratuity that is not otherwise available to them, Congress may condition a state's acceptance of that gift upon a waiver of its immunity. *See College Sav. Bank*, 527 U.S. at 686-87.

Support for gratuity waivers is found in *College Savings Bank's* approving discussions of *Petty v. Tennessee-Missouri*

*Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959), and *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987). *Petty* held that a bistate commission, created pursuant to an interstate compact, had consented to suit in federal court because Congress' approval of the compact included a provision permitting such a suit. *See* 359 U.S. at 281-82; *see also College Sav. Bank*, 527 U.S. at 686. Because "states cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Sav. Bank*, 527 U.S. at 686. Similarly, *Dole* held that, under its spending powers, Congress could condition its grant of funds upon the states taking certain actions; therefore, acceptance of the funds entailed an agreement to that condition. *See* 483 U.S. at 210-12; *see also College Sav. Bank*, 527 U.S. at 686. "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *College Sav. Bank*, 527 U.S. at 686-87; see also id. at 686 (stating that Petty and Dole are "fundamentally different" from *Parden*).

In applying a gratuity constructive waiver analysis to the TCA, the first issue to be resolved is "whether Congress, in inviting the states to waive their Eleventh Amendment immunity, has done so with sufficient clarity." *Illinois Bell*, 222 F.3d at 340, 2000 WL 1010863, at *15 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)). On this point, the court adopts the Seventh Circuit's comprehensive analysis in *Illinois Bell* concluding that, although the TCA does not contain explicit waiver language, the structure of the statute clearly expresses Congress' intent that "states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at *15.

The second issue is whether a state's decision to regulate pursuant to the TCA constitutes an unequivocal gratuity

waiver of its sovereign immunity. The court joins the Seventh and Tenth Circuits, as well as other district courts, in holding that, because Congress could have revoked a state's authority to regulate telecommunications entirely, a state commission's participation in the TCA's procedures regulating access agreements constitutes a gratuity constructive waiver. Crucial to the Supreme Court's distinction between a *Parden* constructive waiver and a gratuity constructive waiver is whether the state has received a gift or whether it was effectively coerced into waiving its immunity. The Court emphasized that "the point of coercion is automatically passed—and the voluntariness of the waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *College Sav. Bank*, 527 U.S. at 687. While, prior to 1996, regulation of intrastate phone services was left to the states, *see, e.g., Iowa Utils. Bd.*, 525 U.S. at 402-05 (Thomas, J., concurring in part, dissenting in part) (detailing history of federal and local telephone regulation prior to the 1996 Act), the TCA "unquestionably" took away certain aspects of the state's control over local telecommunications, *id.* at 378 n.6, and, "although it did not do so, Congress could have preempted all state regulation of local phone service." *Public Serv. Comm'n*, 216 F.3d 929, 938, 2000 U.S. App. LEXIS 14348, at *23, 2000 WL 783382, at *8 (citing *FERC v. Mississippi*, 456 U.S. 742, 764, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)). As the Tenth Circuit explained,

> with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in Petty and Dole, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a

> state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.

*Id.; see also Illinois Bell*, 222 F.3d at 344, 2000 WL 1010863, at *17 ("Here, the gratuity is federal regulatory power; the condition is waiver of the state's immunity."); *McMahon*, 80 F. Supp. 2d at 232-33 (holding that state participation in federal telecommunications regulation is a gratuity upon which Congress may condition a waiver of state sovereign immunity); *Global NAPS S.*, 77 F. Supp. 2d at 499 (holding that the utility commission was acting under a grant of federal power when it presided over an interconnection agreement and, in so doing, was accepting the gift of this power in exchange for its waiver of immunity).

The PUC relies upon two district courts decisions that held that the states were not offered a gratuity, but rather were coerced into participating in the federal scheme by the Hobson's choice of either consenting to federal regulation and giving up sovereign immunity or losing their power to regulate local exchange carriers. *See AT&T Communications of the S. Cent. States, Inc. v. BellSouth Communications, Inc.*, 43 F. Supp. 2d 593, 601-02 (M.D. La. 1999); *Bell Atlantic-Md., Inc. v. MFS Intelenet of Md., Inc.*, 1999 U.S. Dist. LEXIS 16477, at *9-10 (D. Md. 1999)[13]. The PUC empha-

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[13] *Illinois Bell*, 222 F.3d 323, 2000 U.S. App. LEXIS 17739, 2000 WL 1010863, reversed a third district court case upon which the PUC relied, *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin*, 57 F. Supp. 2d 710, 715 (W.D. Wis. 1999).

The PUC also argues that, in addition to the two district courts, the Sixth Circuit has rejected the notion of a gratuity waiver. However, the Sixth Circuit, in a footnote, simply acknowledged that *College Savings Bank* generally rejected the notion of constructive waiver, without addressing whether a gratuity constructive waiver survived that decision. *See GTE N., Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000). The

sizes that any condition that requires it to waive its immunity in order to continue exercising its traditional authority to regulate local telephone markets is inherently coercive. However, these cases, and the PUC's position, fail to acknowledge properly that Congress has the power to preempt completely state regulation of telecommunications. "Congress could-and did-take over regulation of a part of the telecommunications industry. . . . Such regulation is no longer an 'otherwise permissible activity' for states. Congress may choose to 'give back' to states some of the regulatory power Congress has taken away, and Congress may attach certain conditions to the return of that power." *Illinois Bell*, 222 F.3d at 344, 2000 WL 1010863, at *18; *see also id.*, 222 F.3d at 343, 2000 WL 1010863, at *17 (The state commissions have conducted arbitrations for interconnection agreements. . . [and] have approved and enforced those agreements . . . under a federal grant of power. Their authority to act was derived from provisions of the Act and not from their own sovereign authority."); *McMahon*, 80 F. Supp. 2d at 233 n.12 ("Because Congress has this undisputed power . . . , continued state regulation in this area following the enactment of the Telecommunications Act is (in the constitutional sense) a gratuity upon which Congress may condition federal court review of state commission actions."). Finally, the PUC argues that only the Commonwealth may waive its immunity and any action by the Commission does not constitute a valid waiver. On this issue, the court again adopts the reasoning of the Seventh Circuit and finds that the Commonwealth has waived its immunity by failing to prevent the Commission from participating in the federal scheme under the TCA. *See Illinois Bell*, 222 F.3d at 344, 2000 U.S. App. LEXIS 17739, at *56, 2000 WL 1010863, at *17 n.10.

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court does not find *Strand* persuasive on the issue of waiver in light of the considered decisions by the Seventh and Tenth Circuits.

2. *Ex Parte Young*

In the alternative, the court finds that even if the Commission is immune, this action may proceed against the individual Commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)[14]. That doctrine operates as an exception to the general rule of state sovereign immunity and allows suits against state officials for prospective injunctive relief to end a continuing violation of federal law. *See id.* at 159-60;[15] *see also Seminole*

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[14] Worldcom argues that this court is collaterally estopped from deciding the PUC's sovereign immunity claim, since the Middle District rejected that argument. *See MCI Telecomm. Corp. v. Bell*, Report and Recommendation (M.D. Pa. Aug. 10, 1998) (finding no Eleventh Amendment immunity because of the PUC's waiver and, alternatively, under *Ex parte Young*); *id.* Order (M.D. Pa. Nov. 5, 1998) (adopting Report and Recommendation).

> Traditionally, four factors must be present before the application of collateral estoppel is appropriate: (1) the previous determination was necessary to the decision; (2) the identical issue was previously litigated; (3) the issue was actually decided in a decision that was final, valid, and on the merits; and (4) the party being precluded from relitigating the issue was adequately represented in the previous action.

*Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 37 V.I. 526, 126 F.3d 461, 474-75 (3d Cir. 1997).

The Middle District court ruled on immunity prior to *College Saving Bank*, and did not reach the issue of a gratuity constructive waiver, nor were the issues of abstention, which are unique to this case, raised. While the court did address *Ex parte Young*, as far as can be discerned from the record before this court, the Middle District court did not address the remedial scheme limitation of *Seminole Tribe*, discussed infra.

[15] While the PUC argues that the doctrine only applies when Constitutional rights are violated, numerous cases have recognized that the doctrine extends to violations of federal law. *See e.g., Green v. Mansour*, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law"); *Allegheny County Sanitary Auth. v. United States EPA*, 732 F.2d 1167,

*Tribe*, 517 U.S. at 73. The Sixth, Seventh, and Tenth Circuits have all found that Ex parte Young allows actions under section 252 to proceed against individual commissioners. *See Illinois Bell*, 222 F.3d at 336, 2000 WL 1010863, at *18-21; *Public Serv. Comm'n*, 216 F.3d 929, 939, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9; see also *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000) (holding that application of section 252 against the individual commissioners of the Michigan Public Service Commission "is a straightforward *Ex parte Young* case"; noting that most district courts have held the same).

The PUC, however, argues that *Seminole Tribe*'s remedial scheme limitation of *Ex parte Young* applies with equal force to the TCA. In *Seminole Tribe*, the Court cautioned that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based on *Ex parte Young*." 517 U.S. at 74. The statutory scheme at issue in *Seminole Tribe* was the Indian Gaming Regulation Act, that, inter alia, set forth a process by which states and tribes were to negotiate a tribal-state compact governing the conduct of gaming activity by the tribe. See id. at 48-49. States were required to negotiate in good faith, and the Act provided that a tribe could bring suit in federal district court if the state failed to do so. *See id.* at 49-50. If the court found for the plaintiff tribe, the Act's elaborate remedial scheme required the court to order the parties to conclude a compact within sixty days. If the parties failed to do so, the court was to appoint a mediator who would select one of the proposals submitted by the parties. The state was required to accept the compact selected by the mediator within sixty days,

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1174 (3d Cir. 1984) ("When federal statutory law has been violated, federal courts may grant an injunction for prospective relief against state officials[.]").

and, if it failed to do so, the Secretary of the Interior was to prescribe the procedures under which the tribe could conduct gaming on its reservation. *See id.* at 50, 74. Thus, in contrast to the "full remedial powers" available under *Ex parte Young*, the Act only provided for a "quite modest set of sanctions" against an uncooperative state. *Id.* at 75; *see also id.* ("It is difficult to see why an Indian tribe would suffer through the intricate scheme of [the Act] when more complete and more immediate relief is available under *Ex parte Young*."). The Court held that because Congress chose "to impose upon the State a liability that is significantly more limited than would be the liability imposed on the state officer under *Ex parte Young*," the tribe could not proceed against Florida under that doctrine. *Id.* at 75-76.

Unlike the Indian Gaming Regulation Act, section 252 does not impose an elaborate remedial scheme upon a reviewing court; in fact, the statute fails to specify any particular relief. *See Illinois Bell*, 222 F.3d 323, 2000 U.S. App. LEXIS 17739, 2000 WL 1010863, at *19-20 (holding that section 252(e)(6) does not indicate how a court is to enforce its ruling and that, therefore, *Seminole Tribe* does not preclude application of *Ex parte Young* against individual commissioners); *McMahon*, 80 F. Supp. 2d at 234 (holding that the TCA "is silent as to how federal district courts should enforce their rulings, thus implying that they enjoy the full panoply of remedies allowable in a *Young* suit"); *Southwestern Bell*, 86 F. Supp. 2d at 947-48 (holding that the TCA's provision for federal judicial review is far simpler than the Indian Gaming Regulation Act's detailed remedial scheme). The PUC contends that because section 252 only allows a federal court to determine whether or not an access agreement meets sections 251 and 252 of the TCA, a court's power to prescribe remedies is curtailed. However, section 252 only limits a district court's scope of review, it does not render the TCA vulnerable to *Seminole Tribe*'s remedial scheme limitation.

Thus, the court joins with the Sixth, Seventh, and Tenth Circuits in holding that this action may proceed against the individual commissioners for prospective injunctive relief. [16]

C. Abstention

The PUC argues that if this court does not dismiss the action under the Eleventh Amendment, it should nevertheless abstain. In support of its argument, the PUC invokes a plethora of doctrines—namely abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943), *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), *Railroad Commission v. Pullman*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). The PUC faces a heavy burden of persuasion that abstention is appropriate under any of these doctrines:

> Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or state agency will have the opportunity to decide the matters at issue. The doctrine, born out of a concern for the maintenance of our federal system, represents an extraordinary and narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. Abdication of the obligation to decide cases can be justified

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[16] The court rejects the PUC's remaining arguments. The PUC's contention that the suit cannot proceed against the individual commissioners because the Commission is the real party in interest ignores the fiction of *Ex parte Young*. Its argument that the Commission is an indispensable party is similarly unpersuasive. The PUC's policy argument that application of *Ex parte Young* will turn state administrative appeals into federal cases and flood the federal courts ignores the fact Congress essentially provided for just such a review structure in the TCA.

> under this doctrine only in the exceptional circumstances where the order to the parties to repair to State court would clearly serve an important countervailing interest.

*Kentucky W. Va. Gas Co.*, 791 F.2d at 1114 (citations, punctuation omitted).

1. The Question of Exclusive Federal Jurisdiction

The United States and AT&T contend that this court has exclusive jurisdiction over the federal challenges to the Global Order, relying on sections 252(e)(4) and 252(e)(6). The question of whether a state court may even hear the federal claims is relevant in determining whether any of the abstention doctrines may be invoked.

As noted previously, section 252(e)(4), entitled "Schedule for decision," provides that "no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). Section 252(e)(6), entitled "Review of State commission actions," provides that "in any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).

By its terms, section 252(e)(4) appears to vest exclusive federal jurisdiction only over a state commission's approval or rejection of an agreement. Arguably, the Global Order does not fit within this narrow frame since it does not specifically approve or reject an agreement between an incumbent LEC and a potential competitor.[17] However, two considerations counsel against interpreting section 252(e)(4) so narrowly. First, it is undisputed that the Global Order sets rates that will

[17] The PUC has not argued that this court does not have jurisdiction pursuant to section 252(e)(6).

be incorporated into future access agreements. Thus, even if a state court has jurisdiction over the federal claims implicated by the Global Order, once the rates are incorporated into an agreement, only a federal court would have jurisdiction over these claims. Since the TCA allows a state commission to consolidate its proceedings under section 252 in order to reduce administrative burdens, *see* 47 U.S.C. § 252(g), it appears contrary to the review scheme of section 252(e) to conclude that a state commission's decision in a consolidated proceeding may be reviewed by a state court, but a decision in separate proceedings may not be. Second, reading section 252(e)(4) in conjunction with 252(e)(6) suggests that the grant of federal jurisdiction under 252(e)(6) should be construed to be equivalent to the exclusion of state jurisdiction under section 252(e)(4). *See Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999); *see also id.* at 571 (holding that when read in conjunction, sections 252(e)(6) and (e)(4) should be interpreted to mean "that Congress envisioned suits reviewing 'actions' by state commissions and that those suits were to be brought exclusively in the federal courts."); cf. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 480 (5th Cir. 2000) ("We conclude that federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements.").

The court, however, declines to decide at this time whether its jurisdiction over the federal challenges to the Global Order is exclusive because other factors necessary to the exercise of each abstention doctrine invoked by the PUC are not present. Thus, even without deciding the question of whether there is exclusive federal jurisdiction over the federal aspects of Global Order, the court finds that none of the abstention doctrines applies.

2. Abstention Doctrines

a. *Burford*

*Burford* abstention avoids needless conflict with a state's administration of its own affairs. Under this type of abstention, "where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies" when one of two factors is met: there must be "'difficult questions of state law bearing on policy problems of substantial public import'" or "the 'exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (quoting *Colorado River*, 424 U.S. at 814)) (NOPSI)[18]. There are no questions of state law before this court; nor would a decision in this forum disrupt the state's efforts to establish a coherent policy under state law, given the TCA's clear intent to inject certain federal standards and federal oversight into state regulation of local services. *See Zablocki v. Redhail*, 434 U.S. 374, 380 n.5, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978) ("There is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."). Therefore, *Burford* abstention is not appropriate in this action.

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[18] The first point of analysis is whether there is timely and adequate review in the state court, for "only if [the court] determines that such review is available, should it turn to the other issues." *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 104 (3d Cir. 1999) (citation, punctuation omitted); *see also id.* at 108 (holding *Burford* abstention is inappropriate when the federal court has exclusive jurisdiction over at least some of the claims). Because this court declines to decide whether it has exclusive jurisdiction over the parties' challenge to the Global Order under the TCA, it addresses the other issues.

b. *Younger*

*Younger* abstention, which is rooted in concerns of comity and federalism, requires that federal courts refrain from hearing constitutional challenges to state action under certain circumstances in which the federal action is regarded as an improper intrusion on the right of a state to enforce its own laws in its own courts. "Three requirements must be met before *Younger* abstention is appropriate: (1) there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere, (2) the state proceedings must implicate important state interests, and (3) the state proceedings must afford an adequate opportunity to raise the constitutional claims." *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996). *Younger* abstention does not extend to a state judicial proceeding reviewing legislative or executive action, as is the case here. *See NOPSI*, 491 U.S. at 368. In *NOPSI*, the Court contrasted these types of actions with "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions" in which *Younger* abstention might be appropriate. *Id.* The Court held that a state court action in which a decision of a rate-making body was being challenged was "no more than a state court challenge to completed legislative action" and not a proceeding that would require *Younger* abstention. *Id.* at 373; *see also id.* ("There is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts."). Here too, a decision in this court will not affect the state court's ability to perform its judicial functions: the action in the Commonwealth court is simply a challenge to a decision of the state's rate-making body. *Younger* abstention does not apply.

c. *Pullman*

A federal court should abstain under *Pullman* and avoid deciding a federal constitutional question if the case may be disposed in state court on questions of state law. "As a matter of law, *Pullman* abstention requires the following special circumstances: (1) uncertain issues of state law underlying the federal constitutional claim; (2) state law issues subject to state court interpretation that could obviate the need to adjudicate or substantially narrow the scope of the federal constitutional claim; and (3) an erroneous construction of state law by the federal court would disrupt important state policies." *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101, 106 (3d Cir. 1996) (citations omitted); *see also Stretton v. Disciplinary Bd. of the Superior Ct.*, 944 F.2d 137, 140 (3d Cir. 1991) (same). If all three circumstances are present, the court should make a discretionary decision, based on equitable considerations, whether abstention is appropriate under the circumstances. *See Presbytery of N.J.*, 99 F.3d at 106. These considerations include "the availability of an adequate state remedy, the length of time the litigation has been pending, and the potential impact on the parties caused by delay in obtaining a state ruling." *Stretton*, 944 F.2d at 140.

Here, at least two of the circumstances necessary for an exercise of *Pullman* abstention are not present because there are no state law issues underlying the federal constitutional claims and because this action does not raise any state law claims. Admittedly, the Global Order was decided under both state and federal telecommunications law, and, arguably, the state court's decision of the state law aspects of the Order could affect the rates and determinations at issue here. In fact, as Bell conceded at the hearing, one of the forms of relief it seeks from the state court, invalidation of the entire Global Order, would render this case moot. However, that con-

sideration alone is insufficient to allow Pullman abstention and, accordingly, the court will not abstain under that doctrine[19].

d. *Colorado River*

While the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" by Congress, *Colorado River* abstention provides for some extremely limited circumstances where considerations of "wise judicial administration" allow a federal court to defer to pending state proceedings in order to avoid duplicative litigation. 424 U.S. at 817. As a threshold matter, the two actions must be parallel; cases are generally parallel when they involve the same parties and claims. *See Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). Factors that can support *Colorado River* abstention include: "(1) whether the state court assumed in rem jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums." Ryan, 115 F.3d at 196 (citing *Colorado River*, 424 U.S. at 818-19). In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), the Supreme Court identified two other factors: whether the state court would adequately protect the rights at issue and whether state or federal law provides the rule of decision. *See id.* at 25-27. With regard to the latter factor, "the presence of federal law issues must always be a major consideration weighing against" abstention. *Id.* at 25-26.

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[19] Furthermore, even if all the *Pullman* factors were present, the court would exercise its discretion and not abstain: it is an open question whether the state court can provide an adequate remedy regarding the federal claims and any delay in eliminating barriers to competition in local telephone markets is against the public interest.

However, no one factor is determinative, and "only the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 818-19.

Even assuming that the proceedings before the state court and this court are parallel within the meaning of *Colorado River*, none of the other factors favor abstention. The PUC relies primarily on the need to avoid piecemeal litigation and the presence of state law issues in advocating for *Colorado River* abstention. However, avoidance of piecemeal litigation only counsels in favor of abstention when there is an articulated congressional policy against piecemeal litigation. *See Ryan*, 115 F.3d at 198. In the context of the TCA, there is no such articulated policy. In fact, the statutory scheme, which envisions exclusive federal jurisdiction over some matters, while preserving a state's authority to act, consistent with the TCA, suggests that Congress intended the very opposite result. *Compare* 47 U.S.C. § 252(e)(6) (providing for federal jurisdiction over determinations of a state commission), *with id.* § 253(b) ("Nothing in this section shall affect the ability of a State to impose . . . consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."). Moreover, the *Cone* factors counsel against abstention since this case is to be decided under federal, not state, law and, as noted previously, there is a serious question as to whether the state court can address the federal claims. Application of *Colorado River* abstention is inappropriate.

D. Dismissal of Claims Pursuant to Rule 12(b)(6)

The PUC argues that Worldcom and AT&T's crossclaims must be dismissed as untimely because Rule 1512 of the Pennsylvania Rule of Appellate Procedure applies to any challenges to the Global Order. That rule provides for a thirty-

day period in which to file a petition for review, and an additional fourteen-day period in which to file a cross petition. The PUC, however, fails to make any compelling argument why Pennsylvania's rules of appellate procedure should apply to this action, which is brought under federal law. Because the TCA does not specify any statute of limitations, the federal default statute of limitations of four years is applicable to this cause of action. *See* 28 U.S.C. § 1658. The court is not unsympathetic to the PUC's position that four years is far too long a window to allow challenges to access agreements. However, such an argument should be directed to Congress rather than to this court. The claims made by Worldcom and AT&T are timely.

The PUC also contends that the claims brought by Bell, Worldcom, and AT&T that invoke an arbitrary and capricious standard must be dismissed for failure to state a claim, arguing that this is not the correct standard of review and that Bell, Worldcom, and AT&T have impermissibly imported the arbitrary and capricious standard from the Administrative Procedure Act. This argument is premature. The merits of the telecommunications companies' challenge to the Global Order are not yet before the court, and accordingly, the court will defer a decision on the appropriate standard of review to be employed. This portion of the PUC's motion is denied without prejudice.

Similarly, the court will deny without prejudice the portion of the PUC's motion that seeks to dismiss Bell's claim under 42 U.S.C. § 1983. The PUC has failed to demonstrate that there are no set of facts upon which relief could be granted.

III. Conclusion

This action is not barred by the Eleventh Amendment because PUC has waived its sovereign immunity. In the alternative, the case may proceed against the individual commissioners under *Ex parte Young*. None of the doctrines

invoked by the PUC require the court to abstain. The PUC's motion to dismiss AT&T and Worldcom's crossclaims as untimely is denied. The PUC's motion to dismiss the portions of Bell, AT&T, and Worldcom's claims that invoke an arbitrary and capricious standard, and the PUC's motion to dismiss Bell's 42 U.S.C. § 1983 claim, are denied without prejudice.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 99-5391

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BELL ATLANTIC—PENNSYLVANIA, INC.,
*Plaintiff*,

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Defendants*.

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ORDER

AND NOW, this 3rd day of August, 2000, upon consideration of defendants the Pennsylvania Public Utility Commission and the individual Commissioners' Motion to Dismiss (doc. no. 30), and intervening Senators Fumo, Madigan, and White's Motion for Judgment on the Pleadings (doc. no. 46), the responses, and reply thereto, and after a hearing, it is hereby ORDERED that the motions are DENIED.[1]

BY THE COURT:

MARVIN KATZ, S.J.

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[1] Those portions of the motions that seek to dismiss counts four and five of the complaint, as well as to dismiss the portions of the crossclaims that invoke an arbitrary and capricious standard of review, are denied without prejudice.

Supreme Court
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No. 01-1477

# In the Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,
PETITIONERS

*v.*

MCI TELECOMMUNICATIONS, ET AL.

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pgs

## QUESTIONS PRESENTED

1. Whether a State waives its Eleventh Amendment immunity from suit by voluntarily assuming regulatory authority under the Telecommunications Act of 1996.

2. Whether individual members of a state public utility commission may be sued in federal court under the doctrine of *Ex parte Young* for alleged ongoing violations of federal law in performing federal regulatory functions under the Telecommunications Act of 1996.

3. Whether federal courts may apply a *de novo* standard of review to state public utility commissions' legal determinations under the Telecommunications Act of 1996.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL., PETITIONERS

*v.*

MCI TELECOMMUNICATIONS, ET AL.

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals in *MCI Telecommunications Corp.* v. *Bell Atlantic-Pennsylvania* (Pet. App. 1a-54a) is reported at 271 F.3d 491. The opinion of the court of appeals in *Bell Atlantic-Pennsylvania* v. *Pennsylvania Public Utility Commission* (Pet. App. 55a- 66a) is reported at 273 F.3d 337.

### JURISDICTION

The judgments of the court of appeals were entered on November 2, 2001. A petition for rehearing in *MCI Telecommunications* was denied on January 4, 2002, and a petition for rehearing in *Pennsylvania Public Utility Commission* was denied on January 15, 2002 (Pet. App. 67a-68a, 70a-71a). The petition for writs of

certiorari was filed on April 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq.*) "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753, 1756 (2002). Among other things, the 1996 Act requires incumbent local exchange carriers to enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The 1996 Act permits state public utility commissions to exercise certain regulatory authority respecting such interconnection agreements, including the authority to arbitrate, approve, and enforce them. See, *e.g.*, 47 U.S.C. 252(b) and (c) (arbitration); 47 U.S.C. 252(e)(1)-(4) (approval or rejection); *Verizon Maryland*, 122 S. Ct. at 1758 n.2 (enforcement).[1] If a state commission elects not to exercise such authority, the Federal Communications Commission (FCC) acts in its stead. 47 U.S.C. 252(e)(5).

2. Respondent MCI Metro Access Transmission Services (MCI) and other prospective entrants into local telecommunications markets in Pennsylvania sought to enter into interconnection agreements with respondent Verizon Pennsylvania (then Bell Atlantic-Pennsylvania), the incumbent local exchange carrier. Although the parties attempted to agree on terms of access through negotiation, they were unable to resolve all issues. MCI and other parties to the agreement

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[1] All citations of provisions of the 1996 Act are of the 1999 Supplement to the United States Code.

asked petitioner Pennsylvania Public Utility Commission (PPUC) to resolve the open issues. Pet. App. 2a.

The PPUC elected to exercise regulatory authority under the 1996 Act. The PPUC arbitrated the open issues and required revision of the interconnection agreement. MCI and Verizon filed the revised agreement and requested the PPUC's arbitration of one remaining issue. The PPUC arbitrated that issue, required further revision of the agreement, and conditionally approved it. Pet. App. 2a, 9a.

MCI filed suit in the United States District Court for the Middle District of Pennsylvania, seeking review of the PPUC's order and naming as defendants the PPUC, its commissioners in their official capacities, and Verizon Pennsylvania. Verizon Pennsylvania filed a counterclaim and a cross-claim. The telecommunications companies alleged that certain portions of the arbitrated interconnection agreement did not comply with the requirements of the 1996 Act. Pet. App. 2a-3a, 9a.

The PPUC and its commissioners moved to dismiss on various constitutional grounds, including that they were immune from suit under the Eleventh Amendment. The United States intervened to defend the constitutionality of the 1996 Act. Pet. App. 3a, 9a-10a.

The district court denied the motion to dismiss. Subsequently, the court issued a decision on the merits, affirming the PPUC's orders in part and reversing in part, and remanding to the PPUC for further proceedings. Pet. App. 3a, 10a-11a.

3. Meanwhile, two groups of carriers filed competing petitions with the PPUC concerning, among other issues, the pricing determinations made in the earlier interconnection agreement. The PPUC issued a Global Order disposing of multiple issues. Pet. App. 57a.

Verizon Pennsylvania filed suit in the United States District Court for the Eastern District of Pennsylvania, asserting that portions of the Global Order violated the 1996 Act. It named as defendants the PPUC and its individual commissioners in their official capacities. Pet. App. 58a.

The PPUC and its commissioners moved to dismiss the suit on various grounds, including Eleventh Amendment immunity. MCI and other private parties intervened to file cross-claims and counterclaims against Verizon Pennsylvania, and three state senators intervened to support the PPUC's position on Eleventh Amendment immunity. The United States intervened to defend the constitutionality of the 1996 Act. Pet. App. 58a.

The district court denied the motion to dismiss in all respects. Pet. App. 58a.

4. The United States Court of Appeals for the Third Circuit affirmed the district courts' determinations in both cases that the PPUC and its commissioners are not entitled to Eleventh Amendment immunity from suits challenging their determinations under the 1996 Act. On the merits, the court of appeals affirmed in part and reversed in part in the case from the Middle District of Pennsylvania. The court of appeals held that it did not have appellate jurisdiction to review other aspects of the case from the Eastern District of Pennsylvania.

a. The court of appeals rejected the PPUC's and its commissioners' claim of Eleventh Amendment immunity on two alternative grounds. See Pet. App. 21a-33a (appeal from Middle District of Pennsylvania); *id.* at 60a (incorporating same reasoning in appeal from Eastern District of Pennsylvania).

First, the court of appeals held that Pennsylvania, by electing to exercise regulatory authority under the 1996 Act, waived the PPUC's immunity from such suits. Pet. App. 23a-28a. The court of appeals reasoned that the opportunity to regulate local telecommunications competition under the 1996 Act is a "gratuity" that Congress could offer to the States on the condition that they waive their sovereign immunity. *Id.* at 23a-25a. The court of appeals observed that a State's participation in the regulatory scheme is "voluntary," because a State "may simply decline the invitation to regulate local competition on behalf of the federal government and allow that power to return to the FCC." *Id.* at 27a. The court of appeals determined that 47 U.S.C. 252(e)(6), which provides for federal district court review of state commission decisions under the 1996 Act, is sufficiently clear to give States notice that their public utility commissions may be made parties to such proceedings. Pet. App. 27a-30a.

Second, the court of appeals held that the PPUC commissioners, in their official capacities, are subject to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to the extent that their decisions with respect to interconnection agreements are alleged to violate the 1996 Act. Pet. App. 30a-33a. The court of appeals reasoned that such suits seek to enjoin an ongoing violation of federal law because interconnection agreements "continue to govern the current and future relations among the telephone carriers" until they are superseded by later action by the state commission. *Id.* at 31a. The court of appeals concluded that such suits do not present the special circumstances that militated against *Ex parte Young* actions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Pet. App. 32a-33a.

b. The court of appeals held that the PPUC's legal determinations under the 1996 Act are reviewable *de novo*, while its factual determinations are reviewable for substantial evidence. Pet. App. 34a-36a. In rejecting the PPUC's argument that its interpretations of the 1996 Act should be reviewed under the deferential standard articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), the court of appeals observed that Congress delegated to the FCC, not to the state commissions, the authority to fill gaps in the 1996 Act through binding rulemaking. The court of appeals suggested that conflicts could arise if both the FCC and the state commissions were entitled to deference in their interpretation of the 1996 Act. Pet. App. 35a-36a.

c. The court of appeals affirmed most aspects of the decision from the Middle District of Pennsylvania with respect to the interconnection agreement arbitrated and approved by the PPUC. The court of appeals agreed with the district court that the PPUC erred in requiring MCI to interconnect with Verizon's network at each access tandem serving area, see Pet. App. 37a-38a; that the PPUC did not err in permitting MCI to collocate remote switching modules in Verizon's offices, see *id.* at 38a-41a; and that the PPUC erred in requiring Verizon to provide directory publishing services to MCI at wholesale prices, *id.* at 42a-44a. The court of appeals reversed the district court on two issues, holding that the PPUC's wholesale rates for services sold to MCI for resale are "inconsistent with the language of the [1976] Act," *id.* at 42a, and that the PPUC's prices for network elements should be evaluated by the district court for "whether [they] comport with the [1996] Act," *id.* at 47a.

d. The court of appeals dismissed, for want of appellate jurisdiction, the PPUC's other challenges to the decision from the Eastern District of Pennsylvania with respect to the Global Order. The court of appeals held that the district court's denial of the PPUC's motion to dismiss on res judicata and statute of limitations grounds was not reviewable under the collateral order doctrine. Pet. App. 60a-65a.

## ARGUMENT

The petition for certiorari presents three questions, two of which are virtually identical to those presented in *Verizon Maryland Inc.* v. *Public Service Commission*, 122 S. Ct. 1753 (2002). This Court's decision in *Verizon Maryland* is dispositive as to those questions. The third question, which concerns the standard of review of a state commission's interpretations of the 1996 Act, does not implicate any conflict among the circuits or otherwise warrant the Court's review. The petition should, therefore, be denied.

1. Petitioners contend that the court of appeals erred in holding both that Pennsylvania waived its sovereign immunity from suits challenging the PPUC's exercise of regulatory authority under the 1996 Act (see Pet. 12-22), and that the PPUC commissioners are amenable to suits for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), to challenge their decisions with respect to interconnection agreements as contrary to federal law (see Pet. 22-27). As petitioners concede (Pet. 12), those sovereign immunity questions are "substantially similar" to the sovereign immunity questions in *Verizon Maryland*, which was decided after the petition for certiorari was filed in this case. See PPUC Amicus Br. at 2, *Verizon Md.*, *supra* (acknowledging

the "similar[ity]" of the sovereign immunity questions in the two cases).

In *Verizon Maryland*, this Court held that state public utility commissioners are amenable to suit under the *Ex parte Young* doctrine to assure that their decisions with respect to interconnection agreements are consistent with the 1996 Act and other controlling federal law. See 122 S. Ct. at 1760-1761. In light of that holding, the Court concluded that it did not have to decide whether a State waives its sovereign immunity by voluntarily participating in the regulatory scheme established by the 1996 Act. See *id.* at 1760.

The Court's holding in *Verizon Maryland* with respect to the *Ex parte Young* doctrine is equally applicable here. In both cases, telecommunications carriers sued all of the members of a state public utility commission, in their official capacities, seeking declaratory and injunctive relief from a decision that was alleged to violate the 1996 Act. While this case involves a challenge to the state commission's decision approving a new interconnection agreement, whereas *Verizon Maryland* involved a challenge to a state commission's decision construing and enforcing an existing interconnection agreement, that difference has no bearing on the applicability of the *Ex parte Young* doctrine.

Here, as in *Verizon Maryland*, there is no need to reach the question whether a State waives its immunity from suit by electing to exercise regulatory authority under the 1996 Act. Because a party who contends that a state commission has issued an order contrary to the 1996 Act may seek relief in an *Ex parte Young* action

against the individual commissioners, the party need not also seek relief against the state commission itself.[2]

2. Petitioners also contend (Pet. 27-29) that the court of appeals erred in declining to accord *Chevron* deference to the PPUC's interpretations of the 1996 Act. Every court of appeals that has addressed the question has held, consistent with the Third Circuit here, that state commissions' interpretations of the 1996 Act are reviewable *de novo*. See *U.S. West Communications, Inc.* v. *Sprint Communications Co.*, 275 F.3d 1241, 1248 (10th Cir. 2002); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 482 (5th Cir. 2000); *GTE South, Inc.* v. *Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *U.S. West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999), cert. denied, 530 U.S. 1284 (2000).

The Third Circuit's decision to apply the *de novo* standard is correct. There is no indication that

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[2] Petitioners contend (Pet. 26-27), in passing, that 47 U.S.C. 252(e)(4), which gives the district courts exclusive jurisdiction over suits seeking review of state commission decisions approving or rejecting interconnection agreements, violates the Commerce Clause. Petitioners did not challenge the constitutionality of Section 252(e)(4) in the court of appeals (except for a single sentence in their reply briefs), and the court of appeals did not address any such challenge. Nor is a challenge to Section 252(e)(4) encompassed within the questions presented in the petition. See Pet. (i). The Court ordinarily does not consider claims raised in such circumstances. See Sup. Ct. R. 14.1(a); *Jones* v. *United States*, 527 U.S. 373, 394 n.11 (1999) (declining to address claim outside questions presented in petition); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to address claim not raised in, or addressed by, the court of appeals). In any event, petitioners do not identify any case that has questioned the constitutionality of Section 252(e)(4) under the Commerce Clause, and we are aware of no such case.

Congress contemplated that state commissions would, like the FCC, be entitled to deference in filling gaps in the 1996 Act. See Pet. App. 35a; *GTE South*, 199 F.3d at 744. *De novo* review of state commissions' interpretations of the 1996 Act promotes uniformity in federal law, and avoids tension or inconsistency between the FCC's interpretations and those of the state commissions. See Pet. App. 35a-36a; *AT&T Communications of the South Cent. States, Inc.* v. *BellSouth Telecomms., Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) ("[G]iving deference to state commission determinations might only undermine, rather than promote, a coherent and uniform construction of federal law nationwide.") (quoting *U.S. West Communications, Inc.* v. *Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997)). There is thus no need for this Court to review the courts of appeals' consistent treatment of the question.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1477

IN THE

# Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
*Respondents*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI WORLDCOM NETWORK SERVICES, INC., *et al.*,
*Respondents*.

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS MCI WORLDCOM NETWORK SERVICES, INC., AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

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## QUESTIONS PRESENTED

1. Whether a state utility commission's acceptance of Congress's invitation to arbitrate and approve terms for interconnection agreements under the Telecommunications Act of 1996 constitutes a waiver of the State's Eleventh Amendment immunity where such approval determinations are reviewable exclusively in federal court.

2. Whether this Court's definitive reasoning in *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002), that the doctrine of *Ex parte Young* applies in an official capacity action seeking prospective injunctive relief against state public utility commissioners for alleged ongoing violations of federal law, is dispositive in this official capacity suit for prospective injunctive relief against state public utility commissioners for alleged ongoing violations of the Telecommunications Act of 1996 and the FCC's implementing regulations.

3. Whether a federal court reviewing a state utility commission's interpretation of the federal Telecommunications Act of 1996 exercises *de novo* review or whether such interpretations are entitled to deference.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.) and MCImetro Access Transmission Services LLC (successor to MCImetro Access Transmission Services, Inc.) are both wholly owned subsidiaries of WorldCom, Inc. WorldCom, Inc., is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long-distance and other telecommunications services domestically and internationally. WorldCom, Inc., is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT."

WorldCom, Inc., has no parent companies. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc., owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

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## STATEMENT

Respondents MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC (collectively, "WorldCom"), through counsel, respectfully submit this brief in opposition to the petition for certiorari filed by the Pennsylvania Public Utility Commission and its Commissioners (collectively, the "PUC"). Petitioners seek review of the decision of the United States Court of Appeals for the Third Circuit (1) rejecting, under *Ex parte Young* and principles of waiver, the PUC's assertion of Eleventh Amendment immunity from suit challenging its approval of terms for interconnection agreements under the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"); and (2) exercising *de novo* review of the PUC's interpretation of the federal Act.

Recently, this Court unanimously held that the doctrine of *Ex parte Young* permits suit in federal court against state public utility commissioners for prospective injunctive relief from the commissioners' alleged ongoing violations of the 1996 Act. *See Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. 1753, 1761 (2002). Recognizing the applicability of *Ex parte Young* to claims under the 1996 Act, the Court then declined to reach, as unnecessary, the question whether the state commissioners also had waived their Eleventh Amendment immunity by voluntarily participating in the administration of the Act. *Id.* at 1760. That decision fully resolves the *Ex parte Young* issue in this appeal and confirms that the waiver issue – on which there is no disagreement among the decisions of the courts of appeals – is not independently worthy of this Court's review. And because the Third Circuit's uncontroversial decision with respect to the standard of review is consistent with the decisions of every other court of appeals to have ruled on the issue, this Court should deny the PUC's petition for certiorari.

### 1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Verizon. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654 (2002); *AT&T Corp.*, 525 U.S. at 371. Toward that end, Congress altered the prior balance of federal and state regulatory authority in the area of local telecommunications. *Verizon Communications*, 122 S. Ct. at 1660-61; *AT&T Corp.*, 525 U.S. at 371. Specifically, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *AT&T Corp.*, 525 U.S. at 371-73.

In the Act, Congress expressly preempted all state laws erecting barriers to entry into telecommunications markets. 47 U.S.C. § 253(a). Congress then created three specified routes for competitive entry into local telephone markets to speed the introduction of competition. *Verizon Communications*, 122 S. Ct. at 1662. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. 47 U.S.C. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new

entrants on an unbundled basis. *Id.* § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. *Id.* § 251(c)(4). In each case, Congress prescribed specific federal standards governing the relationships between carriers, *id.* §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73, and vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards created by the Act. *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. § 201(b).

Under the Act, a new entrant that wishes to enter a local telephone market through any one or combination of these three routes must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). State commissions can also hold "generic" proceedings to set rates or establish other terms that satisfy the new federal substantive standards and that an incumbent carrier must offer to various new entrants. Finally, the results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

The Act, however, in no way *requires* state commissions to arbitrate and approve agreements submitted to them. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5). In the spirit of cooperative federalism, then, Congress vested the FCC with the primary rulemaking authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in approving terms

for interconnection agreements, 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1). If a state commission elects to participate in the Act's implementation by arbitrating and approving terms for interconnection agreements, then under section 252(e)(6) of the Act, entitled "Review of State commission actions," "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also Verizon Md. Inc.*, 122 S. Ct. at 1758; *AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel"). Such review in federal district court, moreover, is exclusive, as the Act expressly states that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4); *see also Verizon Md. Inc.*, 122 S. Ct. at 1759.

### 2. Proceedings Before the PUC and the District Courts

*The Middle District Proceedings.* In 1996, WorldCom and AT&T separately began negotiating the terms of interconnection agreements with incumbent local service provider Verizon Pennsylvania Inc. ("Verizon") (then known as Bell Atlantic-Pennsylvania, Inc.). When the negotiations reached an impasse, WorldCom and AT&T filed petitions with the PUC requesting that it arbitrate the differences arising in the

course of the negotiations with Verizon. The PUC accepted the invitation, conducted arbitration proceedings, and issued orders in which it resolved a number of open issues. It then conducted a generic proceeding to set permanent rates at which all competitors would be permitted to lease Verizon's unbundled network elements. After directing the parties to incorporate those new rates into their respective interconnection agreements, the PUC approved the WorldCom-Verizon agreement in November 1997.

Thereafter, WorldCom, AT&T and Verizon all challenged various aspects of the PUC's determinations in the United States District Court for the Middle District of Pennsylvania, pursuant to section 252(e)(6) of the Act and 28 U.S.C. § 1331. The PUC then filed a motion to dismiss, asserting immunity under the Eleventh Amendment and challenging the constitutionality of the 1996 Act under the Tenth Amendment and the Commerce Clause. That motion was denied in full. Pet. Supp. App. sa-27-sa-28. With respect to the PUC's assertion of Eleventh Amendment immunity, the court found that the suit for prospective injunctive relief against the state commissioners was properly brought under the doctrine of *Ex parte Young*, and that the PUC voluntarily accepted the offer to participate in the new federal system set forth in the Act in exchange for waiving its immunity to federal court jurisdiction. *Id.* at sa-34-sa-35.[1]

Rather than take an immediate interlocutory appeal of that denial, as was its right, *see Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993), the PUC instead litigated the merits of the parties' claims in the district court. On June 30, 2000, the district court issued a final

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[1]The district court adopted the reasoning and conclusions of the Magistrate Judge's recommendations on this issue. *See* Pet. Supp. App. sa-29-sa-36.

order disposing of all claims on their merits. Pet. Supp. App. sa-3-sa-26. In doing so, the court exercised *de novo* review over the PUC's legal determinations under the Act and refused to afford those determinations the deference that might otherwise be due the determinations of a federal agency like the FCC.

The PUC subsequently appealed the district court's denial of its claim of Eleventh Amendment immunity and various merits determinations to the United States Court of Appeals for the Third Circuit. It did not appeal the district court's denial of its motion to dismiss on Tenth Amendment and Commerce Clause grounds.

*The Eastern District Proceedings.* In 1998, while judicial review of the initial arbitration decision was pending in the Middle District, the PUC initiated a comprehensive review of the terms by which Verizon was providing access to its network under the 1996 Act. After Verizon and the new entrants filed competing petitions in what became known as the "Global Proceeding," the PUC in September 1999 issued the "Global Order" and directed that its many determinations be incorporated into interconnection agreements between Verizon and all competing carriers. Among other things, the Global Order somewhat reduced the rates at which Verizon was required to lease its network elements to competitors.

In response, Verizon filed a complaint in the United States District Court for the Eastern District of Pennsylvania on October 29, 1999, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Verizon contended that the PUC's pricing determinations in the Global Order were inconsistent with the 1996 Act and the FCC's implementing regulations. Before the PUC filed an answer to Verizon's federal court complaint, however, the PUC, Verizon, WorldCom, AT&T and other parties to the Global Proceeding agreed to commence

settlement negotiations and to stay all judicial challenges to the Global Order. Those negotiations proved unsuccessful. Thus, on February 8, 2000, WorldCom filed a motion to intervene in the federal action, along with its proposed answer, counterclaim and cross-claim challenging the lawfulness of the rates set by the PUC in the Global Order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. WorldCom's motion for intervention was granted on March 2, 2000.

On May 18, 2000, the PUC filed a motion to dismiss the various parties' claims and cross-claims. The PUC alleged, *inter alia*, that the PUC and the individual commissioners were immune from suit in federal court under the Eleventh Amendment. A group of Pennsylvania State Senators who had participated in the Global Proceeding and intervened in federal court moved for judgment on the pleadings on the same grounds. The district court denied both motions to dismiss in full. Like its counterpart in the Middle District, the Eastern District court held that the PUC had waived its Eleventh Amendment immunity by voluntarily participating in the regulatory scheme designed by Congress under the 1996 Act, and that, in any event, suit against the individual PUC Commissioners was proper under the doctrine of *Ex parte Young*. Pet. Supp. App. sa-46-sa-56. The PUC and the Senators then filed interlocutory appeals in the Third Circuit.[2]

**3. Court of Appeals Decisions**

In two decisions issued the same day, a unanimous panel of the Third Circuit affirmed the two district courts' rejection

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[2]Neither the PUC nor the Senators raised a Tenth Amendment or Commerce Clause claim before either the Eastern District court or the court of appeals.

of the PUC's assertion of Eleventh Amendment immunity.[3] Pet. App. 12a-33a, 48a-53a, 60a, 66a. That court held that the two suits were proper *Ex parte Young* actions, and that nothing in the Act precluded reliance on *Ex parte Young* as a basis for federal court review. *Id.* at 30a. It thus expressly agreed with the Sixth Circuit's statement in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000), that a lawsuit challenging a state commission's approval of an interconnection agreement is "'a straightforward *Ex parte Young* case.'" Pet. App. 30a. The court explained that *Ex parte Young* continues to apply "any time a plaintiff seeks prospective relief against individual state officers from an ongoing violation of federal law," as the carriers sought in the cases below. *Id.* at 31a-32a. It also rejected the PUC's contentions that either *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), imposed any limitations on the application of *Ex parte Young* to suits under the 1996 Act. Pet. App. 32a-33a.

In addition, relying on this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Third Circuit held that, although Congress could not abrogate Pennsylvania's sovereign immunity, Pet. App. 13a, Pennsylvania consented to being subject to suit in federal court when it voluntarily chose to participate in the Act's regulatory scheme. Pet. App. 23a ("the submission to suit in federal court, provided for in § 252(e)(6), is valid as a waiver"). Noting the exclusivity of federal court review under the Act, Pet. App. 28a (citing 47 U.S.C. § 252(e)(4)), the court explained that participation in the

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[3]One member of the panel dissented on a merits issue not relevant to the instant petition. Pet. App. 53a-54a.

Act's regulatory scheme was a gratuity that Congress granted to states expressly conditioned on their willingness to waive their immunity to suit in federal court. *Id.* at 24a-25a; *see also id.* at 28a ("The statutory language places the state utility commission on notice that, by choosing to act on an interconnection agreement and to make a decision as to its legality, it submits itself to the jurisdiction of the federal courts."); *id.* at 24a (Congress "validly terminated the states' role in regulating local telephone competition" and then "permitted the states to resume a role in that process" – thus creating a "congressionally bestowed gratuity").[4]

Finally, the Third Circuit affirmed the Middle District court's exercise of *de novo* review over the PUC's legal interpretations of the 1996 Act. *Id.* at 34a-36a. In so holding, the court rejected the PUC's attempt to carve out an exception to the general rule that the deferential standard of review under *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), applies only to federal agencies and not state commissions.

As the court cogently explained:

> [D]eference is accorded to the interpretations of federal statutes by federal administrative agencies, not to interpretations by state agencies. *See GTE South*, 199 F.3d at 745 (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997)).
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> * * *
>
> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the

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[4]The Third Circuit did not address the Tenth Amendment or Commerce Clause because the PUC did not raise Tenth Amendment or Commerce Clause arguments before that court. *See* Pet. App. 10a n.1.

statute through binding rulemaking. *See [United States v.] Mead*, 121 S. Ct. [2164,] 2171 [(2001)]. The power to promulgate binding regulations to implement the requirements of the Act and to fill statutory gaps was granted to the FCC, *see* 47 U.S.C. § 251(d)(1), and those regulations are entitled to deference. *See Mead*, 121 S. Ct. at 2172 (stating that a good indicator of delegation meriting *Chevron* deference is an express congressional authorization for an agency to engage in the rulemaking process). . . . State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

In fact, deference to the state commissions would often be impossible, given the explicit delegation of rulemaking authority to the FCC in § 251(d)(1). The interconnection agreement must comply with the Act and with FCC regulations; if the approved agreement, containing the state commission's interpretations of the law, conflicts with the legal interpretations in the FCC regulations, the FCC interpretation must control under the Supremacy Clause and under the plain language of the Act. If, therefore, the PUC's interpretation conflicts with that of the FCC, the PUC's determination must be struck down.

* * *

We will, therefore, review any PUC legal interpretations contained in the arbitration and interconnection agreement *de novo*.

Pet. App. 34a-36a.

**4. The *Verizon Maryland* Decision**

In *Verizon Maryland*, Verizon Maryland Inc. challenged the lawfulness of a decision of the Maryland Public Service Commission ("MPSC") interpreting and enforcing the reciprocal compensation provisions of an interconnection agreement previously approved under the 1996 Act. Specifically, Verizon alleged, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, that the MPSC's decision constituted an ongoing violation of the 1996 Act and the FCC's implementing regulations. In response, the MPSC claimed that the federal courts lacked subject matter jurisdiction over Verizon's challenge to the MPSC's enforcement determination, and that the MPSC and its commissioners enjoyed Eleventh Amendment immunity from suit in federal court.

On May 20, 2002, this Court unanimously rejected both of the MPSC's claims. First, the Court determined that Verizon's complaint stated a federal claim cognizable under 28 U.S.C. § 1331, regardless of whether Section 252(e)(6) of the 1996 Act might also bestow jurisdiction on the federal courts. *Verizon Md. Inc.*, 122 S. Ct. at 1759.

The Court then held that Verizon's suit seeking prospective injunctive relief for alleged ongoing violations of the 1996 Act "may proceed against the individual [MPSC] commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)." *Id.* at 1760.[5] The Court thus rejected the

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[5]Oral argument in *Verizon Maryland* was consolidated with argument in *Mathias v. WorldCom Technologies, Inc.*, No. 00-878. This Court dismissed the writ of certiorari in *Mathias* as improvidently granted on the day that it issued the *Verizon Maryland* decision. *Mathias v. WorldCom*

Fourth Circuit's reasoning that *Ex parte Young* did not apply because the commission's order likely was consistent with federal law. *Id.* at 1760-61. As the Court reaffirmed, it is enough that the plaintiff's complaint merely *allege* a non-frivolous violation of federal law; "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits." *Id.* (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)). In addition, the Court refused to impose any independent limitation, under the principles enunciated in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), on the application of *Ex parte Young* to claims under the 1996 Act. It explained that the 1996 Act does not create the type of limited remedial scheme that was at issue in *Seminole Tribe*, and therefore does not demonstrate any intent to foreclose *Ex parte Young* jurisdiction. 122 S. Ct. at 1761.

Finally, because it found that Verizon's suit could proceed pursuant to *Ex parte Young*, the Court found it unnecessary to address the question of whether the state commission had waived its Eleventh Amendment immunity by voluntarily participating in the Act's regulatory scheme. *Id.* at 1760.

## REASONS FOR DENYING THE WRIT

The PUC's petition should be denied because this Court has already determined in *Verizon Maryland* that suits against state public utility commissioners for prospective relief from ongoing violations of the 1996 Act are cognizable in federal court under the doctrine of *Ex parte Young*. Although that case arose in the context of a challenge to a state commission's *enforcement* of a previously approved interconnection agreement, and this case presents a challenge to the PUC's *approval* of terms for interconnection agreements in the first

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*Techs., Inc.*, 122 S. Ct. 1780 (2002).

instance, the approval context presents the easier, more straightforward case. *A fortiori*, *Verizon Maryland* is dispositive. And, as the Court explained in *Verizon Maryland*, resolution of the *Ex parte Young* issue obviates the need for this Court to reach the Eleventh Amendment waiver question.

Moreover, neither of the immunity questions presented here has divided the courts of appeals. The Third Circuit's decisions on the *Ex parte Young* and waiver issues are consistent with the rulings of *every* other court of appeals that has ruled on those issues in the approval context. This Court has repeatedly denied petitions for certiorari raising Eleventh Amendment arguments in approval cases, *see infra*, note 10 and p. 18, and in light of *Verizon Maryland*, there is even more reason for the Court to do so again here.

Finally, the Third Circuit's exercise of *de novo* review over the PUC's interpretation and application of the 1996 Act is consistent with the decisions of every other court of appeals to reach the issue and is not independently certworthy. Federal courts uniformly have exercised plenary review over a state agency's interpretation of *any* federal statute, *including the 1996 Act*. There certainly is no reason for the Court to grant review on this entirely uncontroversial issue.

## I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S CORRECT REJECTION OF THE PUC'S ASSERTION OF ELEVENTH AMENDMENT IMMUNITY.

In *Verizon Maryland*, this Court had no difficulty unanimously holding that, for claims seeking prospective relief against ongoing violations of the 1996 Act, "the doctrine of *Ex parte Young* permits [a carrier's] suit to go forward against . . . state commissioners in their official capacities." *Verizon Md. Inc.*, 122 S. Ct. at 1761. That decision renders review of both

Eleventh Amendment issues presented here unnecessary.

### A. *Ex parte Young*

In the wake of *Verizon Maryland*, it is now clear that, with respect to the application of *Ex parte Young*, there is nothing unique about the 1996 Act. As with virtually every other federal statute, suits against state commissioners under the 1996 Act require only the "'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.*, 122 S. Ct. at 1760 (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 296).[6]

For purposes of this "straightforward" *Ex parte Young* analysis, the claims for relief in this case are identical in all material respects to the claims that were properly brought in federal court in *Verizon Maryland.* As in *Verizon Maryland*, the claims for relief here allege that various orders of the state utility commissioners constitute ongoing violations of the 1996 Act and the FCC's implementing regulations, and seek purely prospective injunctive and declaratory relief to remedy those violations. *Compare Verizon Md. Inc.*, 122 S. Ct. at 1760-61, *with* Pet. App. 31a-32a. Thus, after *Verizon Maryland*, there can be no doubt that the Third Circuit properly held that the parties' claims here are cognizable in federal court under the doctrine of *Ex parte Young*, and the PUC's petition should be denied.

Indeed, the only manner in which this case differs from

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[6]In doing so, the Court rejected the application of the limiting principle articulated in *Seminole Tribe* because, according to the Court, the 1996 Act does not "'impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*.'" *Verizon Md. Inc.*, 122 S. Ct. at 1761 (quoting *Seminole Tribe*, 517 U.S. at 75-76).

*Verizon Maryland* is that this is a challenge to a state commission approval determination whereas *Verizon Maryland* was a challenge to a state commission enforcement order. But that makes this case only easier, not harder. For example, unlike in *Verizon Maryland*, here there is no dispute that the plaintiffs' claims arise under section 252(e)(6) of the Act and are within the subject matter jurisdiction of the federal courts. Pet. at 21, 27; Pet App. at 21a-22a. Here, unlike in *Verizon Maryland*, that jurisdiction is exclusive, *see* 47 U.S.C. § 252(e)(4)[7]; *Verizon Md. Inc.*, 122 S. Ct. at 1759, and the unavailability of a federal forum for the plaintiffs' federal claims would thus render plaintiffs wholly without a remedy at the approval stage.[8] Because this case is virtually identical to

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[7]The PUC's passing suggestion that the Act's exclusive jurisdiction provision, section 252(e)(4), is unconstitutional under the Tenth Amendment and Commerce Clause is not properly before this Court. *See* Pet. at 26-27. That issue is not within the scope of the questions presented, was not addressed by the Third Circuit, and, though soundly rejected by the Middle District court, Pet. Supp. App. sa27-sa36, was not raised by the PUC in the court of appeals below. The argument also lacks even a semblance of merit. This Court has already held that Congress possessed the requisite constitutional authority to pass the 1996 Act in the first instance, thereby federalizing those areas of local telephone competition addressed by the Act. *See AT&T Corp.*, 525 U.S. at 378 n.6; *FERC v. Mississippi*, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963) (the authority of Congress to preempt state laws "is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature").

[8]To be sure, the unavailability of state court review is not a prerequisite to the application of *Ex parte Young*. *See Coeur d'Alene*, 521 U.S. at 272. Even where a state forum may be available (as in the enforcement context), review in federal court under the doctrine of *Ex parte Young* is still permissible. *Id.*; *see also Verizon Md. Inc.*, 122 S. Ct. at 1760-61 (applying *Ex parte Young* even though "it may (or may not) also be true that state

– indeed, easier than – *Verizon Maryland*, there certainly is no reason for this Court to grant review of the Third Circuit's opinion, which is in all respects consistent with that decision.[9]

Though it is largely irrelevant now, it is nonetheless worth noting that, contrary to the Petitioners' suggestion, Pet. at 15-16, *every* court of appeals to have addressed the issue has agreed that *Ex parte Young* applies in an approval case such as this. Indeed, five courts of appeals have explicitly held that a federal law challenge to an approval determination of a state commission is a "straightforward *Ex parte Young* case," and *none* has disagreed.[10] In light of *Verizon Maryland*, there certainly is no reason to grant review of that conclusion now.

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contract law, and not federal law" applied). But where, as here (in the approval context), state court review is preempted, *see* 47 U.S.C. § 252(e)(4), the need for federal court review under *Ex parte Young* of a state actor's interpretation and application of federal law is paramount. *See Coeur d'Alene*, 521 U.S. at 271.

[9]The PUC's remaining arguments, that the State here is the real party in interest and that the state commissioners were "authorized" by Congress to implement the 1996 Act, Pet. at 22-26, all were fully briefed to this Court in *Verizon Maryland* to no avail.

[10]*See* Pet. App. 30a-33a (3d Cir.); *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 647 (5th Cir. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000); *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323, 345 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001). Of course, the PUC can no longer even attempt to manufacture a split in the circuits by relying on the Fourth Circuit's recently vacated decision in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), *vacated sub nom. Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002).

**B. Waiver**

In *Verizon Maryland*, this Court explicitly stated that it was unnecessary for it to decide the waiver issue because "even absent waiver" the case could proceed in federal court under the doctrine of *Ex parte Young*. *Verizon Md. Inc.*, 122 S. Ct. at 1760. It follows that, because *Ex parte Young* disposes equally of the assertion of Eleventh Amendment immunity here, the same restraint articulated in *Verizon Maryland* dictates that there is no reason to grant the PUC's petition on the waiver issue in this case.

Indeed, it would make little sense for this Court now to grant review of the very same issue that it declined to reach when that issue was squarely before it, and fully briefed, earlier this Term. Here, the *only* impact of a reversal on the waiver question would be to require the ministerial deletion of the Pennsylvania Commission (as a body) from the caption, and the case still would proceed against the commissioners in their official capacities under *Ex parte Young*. The Court thus should decline to review the waiver issue at this time, which, at least as a practical matter, remains purely academic.[11]

Moreover, the Third Circuit's ruling on the waiver issue is consistent with the decisions of *every* other court of appeals

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[11]The restraint showed in *Verizon Maryland* certainly is nothing new. Where a case can be decided on a ground that is relatively simpler and less controversial, this Court's consistent practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, particularly where they would not affect the outcome of the case. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").

that has resolved it. Every court of appeals to have ruled on the waiver issue in the approval context has faithfully followed this Court's teachings in *College Savings Bank* and agreed that a state commission that chooses to participate in the Act's regime does so in exchange for waiving its immunity to suit in federal court – and this Court has consistently denied petitions for certiorari in those cases when presented. *See MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323, 340-44 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001).[12]

The PUC nevertheless invokes the decisions of the Fourth and Sixth Circuits in a transparent attempt to fabricate a split in the circuits on this issue. Pet. at 15-16. That attempt is unavailing for two reasons. First, in *Verizon Maryland*, this Court vacated the very Fourth Circuit decision on which the PUC relies. *Verizon Md. Inc.*, 122 S. Ct. at 1761. Moreover, the Fourth Circuit had held (erroneously in WorldCom's view) that the parties' enforcement challenge there did not arise under

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[12]The overwhelming majority of district courts that have ruled on the waiver question likewise have held that states voluntarily waive their sovereign immunity when they voluntarily participate in the Act's regulatory scheme. *See, e.g., MCI Telecommunications Corp. v. New York Tel. Co.*, 134 F. Supp. 2d 490 (N.D.N.Y. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d 1104 (W.D. Mich. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. Jul 28, 1997).

section 252(e)(6) of the 1996 Act. *See Bell Atlantic Md.*, 240 F.3d at 301-07. Accordingly, it came as no surprise that the court also held that section 252(e)(6) failed to put the state commission on notice that its enforcement of a previously approved interconnection agreement would waive its immunity from suit in federal court. *Id.* Here, there is no dispute that section 252(e)(6) expressly addresses state commission approval determinations and subjects those determinations to review in federal court. *See* 47 U.S.C. § 252(e)(6); *Verizon Md. Inc.*, 122 S. Ct. at 1758. Accordingly, the Fourth Circuit's rejection of the waiver doctrine in the enforcement context (even if it had not been vacated) is inapposite.[13]

Petitioners also invoke the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000), as demonstrating a division of authority. But that case held only that *Ex parte Young* authorized suit in federal court. *See also Michigan Bell v. Climax Tel.*, 202 F.3d at 867. Like this Court in *Verizon Maryland*, the Sixth Circuit did not go on to address the waiver issue because its *Ex parte Young* determination rendered doing so unnecessary. *See* 209 F.3d at 922 n.6. Thus, the *Strand* court's discussion of the waiver doctrine came only in a footnote in pure and acknowledged dicta. *Id.* Indeed, the state commission itself was not even a defendant in *Strand*. *Id.* at 912. Accordingly, the Sixth Circuit's analysis – of declining to rule on the waiver

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[13]At a minimum, the PUC certainly had notice that it would be subject to suit in federal court by the time that it began the Global Proceeding, as it had already been sued in the Middle District court and its immunity claims had already been rejected there. Pet. Supp. App. sa27-sa28. The decision to arbitrate despite explicit knowledge that a federal court action could ensue surely constitutes waiver. *Cf. Lapides v. Board of Regents of the Univ. System of Ga.*, 122 S. Ct. 1640 (2002) (state attorney general's litigation conduct in removing state court action to federal court constitutes waiver of Eleventh Amendment immunity).

issue after holding that *Ex parte Young* applied – is consistent with this Court's reasoning in *Verizon Maryland* and underscores the futility of this Court's granting review on the waiver issue here.

## II. THE STANDARD OF REVIEW ISSUE DOES NOT WARRANT REVIEW BY THIS COURT.

The appropriate scope of review is not independently worthy of review by this Court, particularly in a petition like this one, in which no merits questions are presented. The Third Circuit's analysis of this straightforward issue was cogent and well-reasoned. *See supra* pp. 9-10. And *every* court of appeals that has addressed this uncontroversial issue has agreed that federal courts should conduct *de novo* review of a state commission's interpretation of the federal 1996 Act. *See, e.g.*, Pet. App. at 34a-36a (3d Cir.); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).[14]

Petitioners candidly admit that *de novo* review is the norm in such circumstances and are unable to cite a single case granting deference to a state commission's interpretation of the

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[14]District courts have consistently reached the same result. *See, e.g., Global Naps, Inc. v. New England Tel. and Tel. Co.*, 156 F. Supp. 2d 72, 77 (D. Mass. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d at 1108-09; *MCI Telecommunications Corp. v. BellSouth Telecommunications Corp.*, 112 F. Supp. 2d 1286, 1291-92 (N.D. Fla. 2000); *MCI v. Bell Atlantic*, 36 F. Supp. 2d 419, 422-23 (D.D.C. 1999); *AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, 1998 WL 657717, at *3 (W.D. Tex. Aug. 31, 1998).

1996 Act or any other federal law. Indeed, federal courts routinely exercise plenary review over a state agency's interpretation and application of federal law. *See, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989) (reviewing Medicaid Act). They do so because state agencies simply do not have the expertise or familiarity that a federal agency has when administering its own statutory mandate. *See Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997) (reviewing Medicaid Act); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) (reviewing National Housing Act). Unlike federal agencies, state agencies are not typically concerned with "the need for coherent and uniform construction of federal law nationwide." *Turner*, 869 F.2d at 141. Here, Congress ensured federal uniformity by granting the FCC exclusive rulemaking authority, thereby rendering deference to state commissions' interpretations of the statute wholly inappropriate.

Deference to inconsistent state commission interpretations of the 1996 Act would cripple the ability of federal courts to provide guidance on the meaning of the Act and the FCC's regulations, and would inject an unacceptable degree of uncertainty into the implementation of the Act's pro-competitive goals. *See AT&T Corp.*, 525 U.S. at 378 n.6, 385 n.10. This Court should deny review of this entirely uncontroversial issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1477

IN THE

# Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
*Respondents*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI WORLDCOM NETWORK SERVICES, INC., *et al.*,
*Respondents*.

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS MCI WORLDCOM NETWORK SERVICES, INC., AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

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## QUESTIONS PRESENTED

1. Whether a state utility commission's acceptance of Congress's invitation to arbitrate and approve terms for interconnection agreements under the Telecommunications Act of 1996 constitutes a waiver of the State's Eleventh Amendment immunity where such approval determinations are reviewable exclusively in federal court.

2. Whether this Court's definitive reasoning in *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002), that the doctrine of *Ex parte Young* applies in an official capacity action seeking prospective injunctive relief against state public utility commissioners for alleged ongoing violations of federal law, is dispositive in this official capacity suit for prospective injunctive relief against state public utility commissioners for alleged ongoing violations of the Telecommunications Act of 1996 and the FCC's implementing regulations.

3. Whether a federal court reviewing a state utility commission's interpretation of the federal Telecommunications Act of 1996 exercises *de novo* review or whether such interpretations are entitled to deference.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.) and MCImetro Access Transmission Services LLC (successor to MCImetro Access Transmission Services, Inc.) are both wholly owned subsidiaries of WorldCom, Inc. WorldCom, Inc., is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long-distance and other telecommunications services domestically and internationally. WorldCom, Inc., is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT."

WorldCom, Inc., has no parent companies. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc., owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

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## STATEMENT

Respondents MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC (collectively, "WorldCom"), through counsel, respectfully submit this brief in opposition to the petition for certiorari filed by the Pennsylvania Public Utility Commission and its Commissioners (collectively, the "PUC"). Petitioners seek review of the decision of the United States Court of Appeals for the Third Circuit (1) rejecting, under *Ex parte Young* and principles of waiver, the PUC's assertion of Eleventh Amendment immunity from suit challenging its approval of terms for interconnection agreements under the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"); and (2) exercising *de novo* review of the PUC's interpretation of the federal Act.

Recently, this Court unanimously held that the doctrine of *Ex parte Young* permits suit in federal court against state public utility commissioners for prospective injunctive relief from the commissioners' alleged ongoing violations of the 1996 Act. *See Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. 1753, 1761 (2002). Recognizing the applicability of *Ex parte Young* to claims under the 1996 Act, the Court then declined to reach, as unnecessary, the question whether the state commissioners also had waived their Eleventh Amendment immunity by voluntarily participating in the administration of the Act. *Id.* at 1760. That decision fully resolves the *Ex parte Young* issue in this appeal and confirms that the waiver issue – on which there is no disagreement among the decisions of the courts of appeals – is not independently worthy of this Court's review. And because the Third Circuit's uncontroversial decision with respect to the standard of review is consistent with the decisions of every other court of appeals to have ruled on the issue, this Court should deny the PUC's petition for certiorari.

### 1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Verizon. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654 (2002); *AT&T Corp.*, 525 U.S. at 371. Toward that end, Congress altered the prior balance of federal and state regulatory authority in the area of local telecommunications. *Verizon Communications*, 122 S. Ct. at 1660-61; *AT&T Corp.*, 525 U.S. at 371. Specifically, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *AT&T Corp.*, 525 U.S. at 371-73.

In the Act, Congress expressly preempted all state laws erecting barriers to entry into telecommunications markets. 47 U.S.C. § 253(a). Congress then created three specified routes for competitive entry into local telephone markets to speed the introduction of competition. *Verizon Communications*, 122 S. Ct. at 1662. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. 47 U.S.C. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new

entrants on an unbundled basis. *Id.* § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. *Id.* § 251(c)(4). In each case, Congress prescribed specific federal standards governing the relationships between carriers, *id.* §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73, and vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards created by the Act. *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. § 201(b).

Under the Act, a new entrant that wishes to enter a local telephone market through any one or combination of these three routes must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). State commissions can also hold "generic" proceedings to set rates or establish other terms that satisfy the new federal substantive standards and that an incumbent carrier must offer to various new entrants. Finally, the results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

The Act, however, in no way *requires* state commissions to arbitrate and approve agreements submitted to them. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5). In the spirit of cooperative federalism, then, Congress vested the FCC with the primary rulemaking authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in approving terms

for interconnection agreements, 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1). If a state commission elects to participate in the Act's implementation by arbitrating and approving terms for interconnection agreements, then under section 252(e)(6) of the Act, entitled "Review of State commission actions," "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also Verizon Md. Inc.*, 122 S. Ct. at 1758; *AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel"). Such review in federal district court, moreover, is exclusive, as the Act expressly states that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4); *see also Verizon Md. Inc.*, 122 S. Ct. at 1759.

**2. Proceedings Before the PUC and the District Courts**

*The Middle District Proceedings.* In 1996, WorldCom and AT&T separately began negotiating the terms of interconnection agreements with incumbent local service provider Verizon Pennsylvania Inc. ("Verizon") (then known as Bell Atlantic-Pennsylvania, Inc.). When the negotiations reached an impasse, WorldCom and AT&T filed petitions with the PUC requesting that it arbitrate the differences arising in the

course of the negotiations with Verizon. The PUC accepted the invitation, conducted arbitration proceedings, and issued orders in which it resolved a number of open issues. It then conducted a generic proceeding to set permanent rates at which all competitors would be permitted to lease Verizon's unbundled network elements. After directing the parties to incorporate those new rates into their respective interconnection agreements, the PUC approved the WorldCom-Verizon agreement in November 1997.

Thereafter, WorldCom, AT&T and Verizon all challenged various aspects of the PUC's determinations in the United States District Court for the Middle District of Pennsylvania, pursuant to section 252(e)(6) of the Act and 28 U.S.C. § 1331. The PUC then filed a motion to dismiss, asserting immunity under the Eleventh Amendment and challenging the constitutionality of the 1996 Act under the Tenth Amendment and the Commerce Clause. That motion was denied in full. Pet. Supp. App. sa-27-sa-28. With respect to the PUC's assertion of Eleventh Amendment immunity, the court found that the suit for prospective injunctive relief against the state commissioners was properly brought under the doctrine of *Ex parte Young*, and that the PUC voluntarily accepted the offer to participate in the new federal system set forth in the Act in exchange for waiving its immunity to federal court jurisdiction. *Id.* at sa-34-sa-35.[1]

Rather than take an immediate interlocutory appeal of that denial, as was its right, *see Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993), the PUC instead litigated the merits of the parties' claims in the district court. On June 30, 2000, the district court issued a final

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[1]The district court adopted the reasoning and conclusions of the Magistrate Judge's recommendations on this issue. *See* Pet. Supp. App. sa-29-sa-36.

order disposing of all claims on their merits. Pet. Supp. App. sa-3-sa-26. In doing so, the court exercised *de novo* review over the PUC's legal determinations under the Act and refused to afford those determinations the deference that might otherwise be due the determinations of a federal agency like the FCC.

The PUC subsequently appealed the district court's denial of its claim of Eleventh Amendment immunity and various merits determinations to the United States Court of Appeals for the Third Circuit. It did not appeal the district court's denial of its motion to dismiss on Tenth Amendment and Commerce Clause grounds.

*The Eastern District Proceedings.* In 1998, while judicial review of the initial arbitration decision was pending in the Middle District, the PUC initiated a comprehensive review of the terms by which Verizon was providing access to its network under the 1996 Act. After Verizon and the new entrants filed competing petitions in what became known as the "Global Proceeding," the PUC in September 1999 issued the "Global Order" and directed that its many determinations be incorporated into interconnection agreements between Verizon and all competing carriers. Among other things, the Global Order somewhat reduced the rates at which Verizon was required to lease its network elements to competitors.

In response, Verizon filed a complaint in the United States District Court for the Eastern District of Pennsylvania on October 29, 1999, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Verizon contended that the PUC's pricing determinations in the Global Order were inconsistent with the 1996 Act and the FCC's implementing regulations. Before the PUC filed an answer to Verizon's federal court complaint, however, the PUC, Verizon, WorldCom, AT&T and other parties to the Global Proceeding agreed to commence

settlement negotiations and to stay all judicial challenges to the Global Order. Those negotiations proved unsuccessful. Thus, on February 8, 2000, WorldCom filed a motion to intervene in the federal action, along with its proposed answer, counterclaim and cross-claim challenging the lawfulness of the rates set by the PUC in the Global Order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. WorldCom's motion for intervention was granted on March 2, 2000.

On May 18, 2000, the PUC filed a motion to dismiss the various parties' claims and cross-claims. The PUC alleged, *inter alia*, that the PUC and the individual commissioners were immune from suit in federal court under the Eleventh Amendment. A group of Pennsylvania State Senators who had participated in the Global Proceeding and intervened in federal court moved for judgment on the pleadings on the same grounds. The district court denied both motions to dismiss in full. Like its counterpart in the Middle District, the Eastern District court held that the PUC had waived its Eleventh Amendment immunity by voluntarily participating in the regulatory scheme designed by Congress under the 1996 Act, and that, in any event, suit against the individual PUC Commissioners was proper under the doctrine of *Ex parte Young*. Pet. Supp. App. sa-46-sa-56. The PUC and the Senators then filed interlocutory appeals in the Third Circuit.[2]

### 3. Court of Appeals Decisions

In two decisions issued the same day, a unanimous panel of the Third Circuit affirmed the two district courts' rejection

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[2]Neither the PUC nor the Senators raised a Tenth Amendment or Commerce Clause claim before either the Eastern District court or the court of appeals.

of the PUC's assertion of Eleventh Amendment immunity.[3] Pet. App. 12a-33a, 48a-53a, 60a, 66a. That court held that the two suits were proper *Ex parte Young* actions, and that nothing in the Act precluded reliance on *Ex parte Young* as a basis for federal court review. *Id.* at 30a. It thus expressly agreed with the Sixth Circuit's statement in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000), that a lawsuit challenging a state commission's approval of an interconnection agreement is "'a straightforward *Ex parte Young* case.'" Pet. App. 30a. The court explained that *Ex parte Young* continues to apply "any time a plaintiff seeks prospective relief against individual state officers from an ongoing violation of federal law," as the carriers sought in the cases below. *Id.* at 31a-32a. It also rejected the PUC's contentions that either *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), imposed any limitations on the application of *Ex parte Young* to suits under the 1996 Act. Pet. App. 32a-33a.

In addition, relying on this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Third Circuit held that, although Congress could not abrogate Pennsylvania's sovereign immunity, Pet. App. 13a, Pennsylvania consented to being subject to suit in federal court when it voluntarily chose to participate in the Act's regulatory scheme. Pet. App. 23a ("the submission to suit in federal court, provided for in § 252(e)(6), is valid as a waiver"). Noting the exclusivity of federal court review under the Act, Pet. App. 28a (citing 47 U.S.C. § 252(e)(4)), the court explained that participation in the

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[3]One member of the panel dissented on a merits issue not relevant to the instant petition. Pet. App. 53a-54a.

Act's regulatory scheme was a gratuity that Congress granted to states expressly conditioned on their willingness to waive their immunity to suit in federal court. *Id.* at 24a-25a; *see also id.* at 28a ("The statutory language places the state utility commission on notice that, by choosing to act on an interconnection agreement and to make a decision as to its legality, it submits itself to the jurisdiction of the federal courts."); *id.* at 24a (Congress "validly terminated the states' role in regulating local telephone competition" and then "permitted the states to resume a role in that process" – thus creating a "congressionally bestowed gratuity").[4]

Finally, the Third Circuit affirmed the Middle District court's exercise of *de novo* review over the PUC's legal interpretations of the 1996 Act. *Id.* at 34a-36a. In so holding, the court rejected the PUC's attempt to carve out an exception to the general rule that the deferential standard of review under *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), applies only to federal agencies and not state commissions.

As the court cogently explained:

> [D]eference is accorded to the interpretations of federal statutes by federal administrative agencies, not to interpretations by state agencies. *See GTE South*, 199 F.3d at 745 (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997)).
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> * * *
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> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the

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[4]The Third Circuit did not address the Tenth Amendment or Commerce Clause because the PUC did not raise Tenth Amendment or Commerce Clause arguments before that court. *See* Pet. App. 10a n.1.

statute through binding rulemaking. *See [United States v.] Mead*, 121 S. Ct. [2164,] 2171 [(2001)]. The power to promulgate binding regulations to implement the requirements of the Act and to fill statutory gaps was granted to the FCC, *see* 47 U.S.C. § 251(d)(1), and those regulations are entitled to deference. *See Mead*, 121 S. Ct. at 2172 (stating that a good indicator of delegation meriting *Chevron* deference is an express congressional authorization for an agency to engage in the rulemaking process). . . . State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

In fact, deference to the state commissions would often be impossible, given the explicit delegation of rulemaking authority to the FCC in § 251(d)(1). The interconnection agreement must comply with the Act and with FCC regulations; if the approved agreement, containing the state commission's interpretations of the law, conflicts with the legal interpretations in the FCC regulations, the FCC interpretation must control under the Supremacy Clause and under the plain language of the Act. If, therefore, the PUC's interpretation conflicts with that of the FCC, the PUC's determination must be struck down.

* * *

We will, therefore, review any PUC legal interpretations contained in the arbitration and interconnection agreement *de novo*.

Pet. App. 34a-36a.

**4. The *Verizon Maryland* Decision**

In *Verizon Maryland*, Verizon Maryland Inc. challenged the lawfulness of a decision of the Maryland Public Service Commission ("MPSC") interpreting and enforcing the reciprocal compensation provisions of an interconnection agreement previously approved under the 1996 Act. Specifically, Verizon alleged, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, that the MPSC's decision constituted an ongoing violation of the 1996 Act and the FCC's implementing regulations. In response, the MPSC claimed that the federal courts lacked subject matter jurisdiction over Verizon's challenge to the MPSC's enforcement determination, and that the MPSC and its commissioners enjoyed Eleventh Amendment immunity from suit in federal court.

On May 20, 2002, this Court unanimously rejected both of the MPSC's claims. First, the Court determined that Verizon's complaint stated a federal claim cognizable under 28 U.S.C. § 1331, regardless of whether Section 252(e)(6) of the 1996 Act might also bestow jurisdiction on the federal courts. *Verizon Md. Inc.*, 122 S. Ct. at 1759.

The Court then held that Verizon's suit seeking prospective injunctive relief for alleged ongoing violations of the 1996 Act "may proceed against the individual [MPSC] commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)." *Id.* at 1760.[5] The Court thus rejected the

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[5]Oral argument in *Verizon Maryland* was consolidated with argument in *Mathias v. WorldCom Technologies, Inc.*, No. 00-878. This Court dismissed the writ of certiorari in *Mathias* as improvidently granted on the day that it issued the *Verizon Maryland* decision. *Mathias v. WorldCom*

Fourth Circuit's reasoning that *Ex parte Young* did not apply because the commission's order likely was consistent with federal law. *Id.* at 1760-61. As the Court reaffirmed, it is enough that the plaintiff's complaint merely *allege* a non-frivolous violation of federal law; "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits." *Id.* (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)). In addition, the Court refused to impose any independent limitation, under the principles enunciated in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), on the application of *Ex parte Young* to claims under the 1996 Act. It explained that the 1996 Act does not create the type of limited remedial scheme that was at issue in *Seminole Tribe*, and therefore does not demonstrate any intent to foreclose *Ex parte Young* jurisdiction. 122 S. Ct. at 1761.

Finally, because it found that Verizon's suit could proceed pursuant to *Ex parte Young*, the Court found it unnecessary to address the question of whether the state commission had waived its Eleventh Amendment immunity by voluntarily participating in the Act's regulatory scheme. *Id.* at 1760.

## REASONS FOR DENYING THE WRIT

The PUC's petition should be denied because this Court has already determined in *Verizon Maryland* that suits against state public utility commissioners for prospective relief from ongoing violations of the 1996 Act are cognizable in federal court under the doctrine of *Ex parte Young*. Although that case arose in the context of a challenge to a state commission's *enforcement* of a previously approved interconnection agreement, and this case presents a challenge to the PUC's *approval* of terms for interconnection agreements in the first

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*Techs., Inc.*, 122 S. Ct. 1780 (2002).

instance, the approval context presents the easier, more straightforward case. *A fortiori*, *Verizon Maryland* is dispositive. And, as the Court explained in *Verizon Maryland*, resolution of the *Ex parte Young* issue obviates the need for this Court to reach the Eleventh Amendment waiver question.

Moreover, neither of the immunity questions presented here has divided the courts of appeals. The Third Circuit's decisions on the *Ex parte Young* and waiver issues are consistent with the rulings of *every* other court of appeals that has ruled on those issues in the approval context. This Court has repeatedly denied petitions for certiorari raising Eleventh Amendment arguments in approval cases, *see infra*, note 10 and p. 18, and in light of *Verizon Maryland*, there is even more reason for the Court to do so again here.

Finally, the Third Circuit's exercise of *de novo* review over the PUC's interpretation and application of the 1996 Act is consistent with the decisions of every other court of appeals to reach the issue and is not independently certworthy. Federal courts uniformly have exercised plenary review over a state agency's interpretation of *any* federal statute, *including the 1996 Act*. There certainly is no reason for the Court to grant review on this entirely uncontroversial issue.

## I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S CORRECT REJECTION OF THE PUC'S ASSERTION OF ELEVENTH AMENDMENT IMMUNITY.

In *Verizon Maryland*, this Court had no difficulty unanimously holding that, for claims seeking prospective relief against ongoing violations of the 1996 Act, "the doctrine of *Ex parte Young* permits [a carrier's] suit to go forward against . . . state commissioners in their official capacities." *Verizon Md. Inc.*, 122 S. Ct. at 1761. That decision renders review of both

Eleventh Amendment issues presented here unnecessary.

### A. *Ex parte Young*

In the wake of *Verizon Maryland*, it is now clear that, with respect to the application of *Ex parte Young*, there is nothing unique about the 1996 Act. As with virtually every other federal statute, suits against state commissioners under the 1996 Act require only the "'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.*, 122 S. Ct. at 1760 (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 296).[6]

For purposes of this "straightforward" *Ex parte Young* analysis, the claims for relief in this case are identical in all material respects to the claims that were properly brought in federal court in *Verizon Maryland*. As in *Verizon Maryland*, the claims for relief here allege that various orders of the state utility commissioners constitute ongoing violations of the 1996 Act and the FCC's implementing regulations, and seek purely prospective injunctive and declaratory relief to remedy those violations. *Compare Verizon Md. Inc.*, 122 S. Ct. at 1760-61, *with* Pet. App. 31a-32a. Thus, after *Verizon Maryland*, there can be no doubt that the Third Circuit properly held that the parties' claims here are cognizable in federal court under the doctrine of *Ex parte Young*, and the PUC's petition should be denied.

Indeed, the only manner in which this case differs from

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[6]In doing so, the Court rejected the application of the limiting principle articulated in *Seminole Tribe* because, according to the Court, the 1996 Act does not "'impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*.'" *Verizon Md. Inc.*, 122 S. Ct. at 1761 (quoting *Seminole Tribe*, 517 U.S. at 75-76).

*Verizon Maryland* is that this is a challenge to a state commission approval determination whereas *Verizon Maryland* was a challenge to a state commission enforcement order. But that makes this case only easier, not harder. For example, unlike in *Verizon Maryland*, here there is no dispute that the plaintiffs' claims arise under section 252(e)(6) of the Act and are within the subject matter jurisdiction of the federal courts. Pet. at 21, 27; Pet App. at 21a-22a. Here, unlike in *Verizon Maryland*, that jurisdiction is exclusive, *see* 47 U.S.C. § 252(e)(4)[7]; *Verizon Md. Inc.*, 122 S. Ct. at 1759, and the unavailability of a federal forum for the plaintiffs' federal claims would thus render plaintiffs wholly without a remedy at the approval stage.[8] Because this case is virtually identical to

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[7]The PUC's passing suggestion that the Act's exclusive jurisdiction provision, section 252(e)(4), is unconstitutional under the Tenth Amendment and Commerce Clause is not properly before this Court. *See* Pet. at 26-27. That issue is not within the scope of the questions presented, was not addressed by the Third Circuit, and, though soundly rejected by the Middle District court, Pet. Supp. App. sa27-sa36, was not raised by the PUC in the court of appeals below. The argument also lacks even a semblance of merit. This Court has already held that Congress possessed the requisite constitutional authority to pass the 1996 Act in the first instance, thereby federalizing those areas of local telephone competition addressed by the Act. *See AT&T Corp.*, 525 U.S. at 378 n.6; *FERC v. Mississippi*, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963) (the authority of Congress to preempt state laws "is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature").

[8]To be sure, the unavailability of state court review is not a prerequisite to the application of *Ex parte Young*. *See Coeur d'Alene*, 521 U.S. at 272. Even where a state forum may be available (as in the enforcement context), review in federal court under the doctrine of *Ex parte Young* is still permissible. *Id.*; *see also Verizon Md. Inc.*, 122 S. Ct. at 1760-61 (applying *Ex parte Young* even though "it may (or may not) also be true that state

– indeed, easier than – *Verizon Maryland*, there certainly is no reason for this Court to grant review of the Third Circuit's opinion, which is in all respects consistent with that decision.[9]

Though it is largely irrelevant now, it is nonetheless worth noting that, contrary to the Petitioners' suggestion, Pet. at 15-16, *every* court of appeals to have addressed the issue has agreed that *Ex parte Young* applies in an approval case such as this. Indeed, five courts of appeals have explicitly held that a federal law challenge to an approval determination of a state commission is a "straightforward *Ex parte Young* case," and *none* has disagreed.[10] In light of *Verizon Maryland*, there certainly is no reason to grant review of that conclusion now.

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contract law, and not federal law" applied). But where, as here (in the approval context), state court review is preempted, *see* 47 U.S.C. § 252(e)(4), the need for federal court review under *Ex parte Young* of a state actor's interpretation and application of federal law is paramount. *See Coeur d'Alene*, 521 U.S. at 271.

[9]The PUC's remaining arguments, that the State here is the real party in interest and that the state commissioners were "authorized" by Congress to implement the 1996 Act, Pet. at 22-26, all were fully briefed to this Court in *Verizon Maryland* to no avail.

[10]*See* Pet. App. 30a-33a (3d Cir.); *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 647 (5th Cir. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000); *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323, 345 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001). Of course, the PUC can no longer even attempt to manufacture a split in the circuits by relying on the Fourth Circuit's recently vacated decision in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), *vacated sub nom. Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002).

**B. Waiver**

In *Verizon Maryland*, this Court explicitly stated that it was unnecessary for it to decide the waiver issue because "even absent waiver" the case could proceed in federal court under the doctrine of *Ex parte Young*. *Verizon Md. Inc.*, 122 S. Ct. at 1760. It follows that, because *Ex parte Young* disposes equally of the assertion of Eleventh Amendment immunity here, the same restraint articulated in *Verizon Maryland* dictates that there is no reason to grant the PUC's petition on the waiver issue in this case.

Indeed, it would make little sense for this Court now to grant review of the very same issue that it declined to reach when that issue was squarely before it, and fully briefed, earlier this Term. Here, the *only* impact of a reversal on the waiver question would be to require the ministerial deletion of the Pennsylvania Commission (as a body) from the caption, and the case still would proceed against the commissioners in their official capacities under *Ex parte Young*. The Court thus should decline to review the waiver issue at this time, which, at least as a practical matter, remains purely academic.[11]

Moreover, the Third Circuit's ruling on the waiver issue is consistent with the decisions of *every* other court of appeals

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[11]The restraint showed in *Verizon Maryland* certainly is nothing new. Where a case can be decided on a ground that is relatively simpler and less controversial, this Court's consistent practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, particularly where they would not affect the outcome of the case. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").

that has resolved it. Every court of appeals to have ruled on the waiver issue in the approval context has faithfully followed this Court's teachings in *College Savings Bank* and agreed that a state commission that chooses to participate in the Act's regime does so in exchange for waiving its immunity to suit in federal court – and this Court has consistently denied petitions for certiorari in those cases when presented. *See MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323, 340-44 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001).[12]

The PUC nevertheless invokes the decisions of the Fourth and Sixth Circuits in a transparent attempt to fabricate a split in the circuits on this issue. Pet. at 15-16. That attempt is unavailing for two reasons. First, in *Verizon Maryland*, this Court vacated the very Fourth Circuit decision on which the PUC relies. *Verizon Md. Inc.*, 122 S. Ct. at 1761. Moreover, the Fourth Circuit had held (erroneously in WorldCom's view) that the parties' enforcement challenge there did not arise under

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[12]The overwhelming majority of district courts that have ruled on the waiver question likewise have held that states voluntarily waive their sovereign immunity when they voluntarily participate in the Act's regulatory scheme. *See, e.g., MCI Telecommunications Corp. v. New York Tel. Co.*, 134 F. Supp. 2d 490 (N.D.N.Y. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d 1104 (W.D. Mich. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. Jul 28, 1997).

section 252(e)(6) of the 1996 Act. *See Bell Atlantic Md.*, 240 F.3d at 301-07. Accordingly, it came as no surprise that the court also held that section 252(e)(6) failed to put the state commission on notice that its enforcement of a previously approved interconnection agreement would waive its immunity from suit in federal court. *Id.* Here, there is no dispute that section 252(e)(6) expressly addresses state commission approval determinations and subjects those determinations to review in federal court. *See* 47 U.S.C. § 252(e)(6); *Verizon Md. Inc.*, 122 S. Ct. at 1758. Accordingly, the Fourth Circuit's rejection of the waiver doctrine in the enforcement context (even if it had not been vacated) is inapposite.[13]

Petitioners also invoke the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000), as demonstrating a division of authority. But that case held only that *Ex parte Young* authorized suit in federal court. *See also Michigan Bell v. Climax Tel.*, 202 F.3d at 867. Like this Court in *Verizon Maryland*, the Sixth Circuit did not go on to address the waiver issue because its *Ex parte Young* determination rendered doing so unnecessary. *See* 209 F.3d at 922 n.6. Thus, the *Strand* court's discussion of the waiver doctrine came only in a footnote in pure and acknowledged dicta. *Id.* Indeed, the state commission itself was not even a defendant in *Strand*. *Id.* at 912. Accordingly, the Sixth Circuit's analysis – of declining to rule on the waiver

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[13]At a minimum, the PUC certainly had notice that it would be subject to suit in federal court by the time that it began the Global Proceeding, as it had already been sued in the Middle District court and its immunity claims had already been rejected there. Pet. Supp. App. sa27-sa28. The decision to arbitrate despite explicit knowledge that a federal court action could ensue surely constitutes waiver. *Cf. Lapides v. Board of Regents of the Univ. System of Ga.*, 122 S. Ct. 1640 (2002) (state attorney general's litigation conduct in removing state court action to federal court constitutes waiver of Eleventh Amendment immunity).

issue after holding that *Ex parte Young* applied – is consistent with this Court's reasoning in *Verizon Maryland* and underscores the futility of this Court's granting review on the waiver issue here.

## II. THE STANDARD OF REVIEW ISSUE DOES NOT WARRANT REVIEW BY THIS COURT.

The appropriate scope of review is not independently worthy of review by this Court, particularly in a petition like this one, in which no merits questions are presented. The Third Circuit's analysis of this straightforward issue was cogent and well-reasoned. *See supra* pp. 9-10. And *every* court of appeals that has addressed this uncontroversial issue has agreed that federal courts should conduct *de novo* review of a state commission's interpretation of the federal 1996 Act. *See, e.g.*, Pet. App. at 34a-36a (3d Cir.); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).[14]

Petitioners candidly admit that *de novo* review is the norm in such circumstances and are unable to cite a single case granting deference to a state commission's interpretation of the

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[14]District courts have consistently reached the same result. *See, e.g.*, *Global Naps, Inc. v. New England Tel. and Tel. Co.*, 156 F. Supp. 2d 72, 77 (D. Mass. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d at 1108-09; *MCI Telecommunications Corp. v. BellSouth Telecommunications Corp.*, 112 F. Supp. 2d 1286, 1291-92 (N.D. Fla. 2000); *MCI v. Bell Atlantic*, 36 F. Supp. 2d 419, 422-23 (D.D.C. 1999); *AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, 1998 WL 657717, at *3 (W.D. Tex. Aug. 31, 1998).

1996 Act or any other federal law. Indeed, federal courts routinely exercise plenary review over a state agency's interpretation and application of federal law. *See, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989) (reviewing Medicaid Act). They do so because state agencies simply do not have the expertise or familiarity that a federal agency has when administering its own statutory mandate. *See Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997) (reviewing Medicaid Act); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) (reviewing National Housing Act). Unlike federal agencies, state agencies are not typically concerned with "the need for coherent and uniform construction of federal law nationwide." *Turner*, 869 F.2d at 141. Here, Congress ensured federal uniformity by granting the FCC exclusive rulemaking authority, thereby rendering deference to state commissions' interpretations of the statute wholly inappropriate.

Deference to inconsistent state commission interpretations of the 1996 Act would cripple the ability of federal courts to provide guidance on the meaning of the Act and the FCC's regulations, and would inject an unacceptable degree of uncertainty into the implementation of the Act's pro-competitive goals. *See AT&T Corp.*, 525 U.S. at 378 n.6, 385 n.10. This Court should deny review of this entirely uncontroversial issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 01-1477

IN THE

# Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
*Respondents*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Petitioners*,

v.

MCI WORLDCOM NETWORK SERVICES, INC.,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

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**On Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

## ARGUMENT IN REPLY

The United States Constitution protects the States and administrative agencies under their control[1] from "any suit in law or equity." The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State,

[1] *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

or by citizens or subjects of any foreign State." U.S. CONST. amend XI. Contrary to the decision of the United States Court of Appeals for the Third Circuit, this case is a textbook example of what is prohibited by the Eleventh Amendment. Contrary to the position of respondents United States and WorldCom, nothing about the recent holding in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. 1753 (2002) (*Verizon Maryland*), requires a denial of this petition. See U.S. Br. at 7-9; WorldCom Br. at 12-13. Thus, the petition should be granted.

In this case, federal district courts have exercised jurisdiction over suits containing federal questions brought by a Delaware corporation against Petitioner Pennsylvania Public Utility Commission (PUC), an administrative agency acting under the control of the Commonwealth of Pennsylvania. Respondents MCI WorldCom Network Services, Inc (formerly MCI Telecommunications Corp.) and MCI Metro Access Transmission Services, Inc. (collectively "WorldCom") are corporations organized under the laws of the State of Delaware and are wholly owned subsidiaries of WorldCom, Inc., a Georgia corporation. *See* App. 1a; WorldCom Br. at ii. Being non-Pennsylvania corporations, respondents are "citizens of another State" [2] vis-a-vis Petitioner PUC. Thus, the constitution immunizes the PUC from "[this] suit in law or equity." U.S. CONST. amend XI.[3]

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[2] A corporation is a citizen of the state in which it is incorporated. See, e.g., *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, ___ S. Ct. ___ , ___ (2002)(2002 U.S. LEXIS 4203) (holding that a "corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively a citizen or subject of such State.").

[3] This protection extends to federal suit commenced "by [Pennsylvania's] own citizens as well." *Lapides v. Board of Regents of Univ. System of Georgia*, 122 S. Ct. 1640, 1642 (2002), citing *Hans v. Louisiana*, 134 U.S. 1 (1890).

The question of jurisdiction over the PUC is relevant because jurisdiction over the PUC is required in order to grant relief requested in the underlying federal complaints arising from 47 U.S.C. § 252.[4] The scope of available relief strikes at the heart of any litigation, including this one where the private party litigants seek, and a district court has granted, a remand to the PUC for further proceedings. *See* Pet. s.a. 5-6 (reproducing district court order "remand[ing] to the PUC to reform the interconnection agreement" and "remand[ing] to the PUC to reconsider its decision regarding pricing of unbundled network elements.").[5] The relief requested is dependent upon the federal district court having the power to affirm, reverse or modify the challenged order and to remand for further proceedings.

In order for a federal district court to have jurisdiction, the PUC's immunity from "any suit" must have been waived. Absent waiver, the "appellate" federal district court may be able to enjoin enforcement of the PUC's order under *Verizon Maryland*,[6] but will be otherwise reduced to an "advisory" court.

This Court has not yet decided whether Eleventh Amendment immunity is waived when a State commission, like the PUC, renders an adjudication that approves or rejects an interconnection agreement, pursuant to 47 U.S.C. § 252. *Verizon Maryland Inc. v. Public Serv. Comm'n of Md.*, 122 S.

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[4] *Verizon Maryland Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. at 1763 (Souter, J., concurring) (noting characterization of §252 actions as a "means of appellate review.").

[5] The establishment of unbundled network element rates is a matter particularly reserved to the States. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384 (1999).

[6] Petitioners do not concede there is such authority. Petitioners submit that their arguments in opposition to jurisdiction over the individually named commissioners in this arbitration case continue to have force and should be accepted by this Honorable Court. *See* Pet. at 21, 22-26.

Ct. at 1760. The *Verizon Maryland* Court was able to avoid an Eleventh Amendment inquiry because the relief at issue in that case was narrower in scope than the relief sought in this case. The relief sought in *Verizon Maryland* was limited to a request "that state officials be restrained from enforcing an order in contravention of controlling federal law." *Id.* It did not contemplate a remand for further state proceedings.

Any application of the *Verizon Maryland* decision to avoid the waiver issue in this case, i.e., where relief is a remand, would render the Eleventh Amendment itself a fiction and conflict with established law. A remand would compel state action in the form of a further adjudication, a greater intrusion on States than enjoining the State from acting. This Court has previously recognized that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. U.S.*, 521 U.S. 898, 925 (1997). While Federal courts have the power to ensure the supremacy of federal law, their power is concomitant with the duty to give "appropriate consideration . . . to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). Thus, federal law dictates that federal courts cannot use their jurisdiction over state officials under *Verizon Maryland* to compel the PUC to exercise its state authority to enforce, execute and carry out regulation on behalf of the Federal Government.

Petitioners contend jurisdiction over the PUC is lacking and have respectfully submitted the question for the Court's consideration. Pet. 13-22. Respondents oppose Petitioners' request on the erroneous theory that it is no longer necessary for the Court to reach the question of waiver. See WorldCom Br. at 17 (arguing the Court's decision in *Verizon Maryland* makes it "unnecessary for it to decide the waiver issue"); U.S. Br. at 8 (arguing the Court does "not have to decide whether a State waives its sovereign immunity"). Indeed, WorldCom

suggests that the issue is "purely academic" contending that "the *only* impact of reversal on the waiver question would be to require the ministerial deletion of the Pennsylvania Commission (as a body) from the caption, and the case still would proceed against the commissioners in their official capacities under *Ex parte Young*."[7] WorldCom Br. at 17.

Respondents' view of this case is wrong for a number of related reasons. First, mere jurisdiction over the individual commissions under the *Verizon Maryland* decision will not suffice to do anything more than enjoining enforcement of the challenged order; it does not authorize the district court to compel formal proceedings before the PUC.[8] Second, as explained, the *Verizon Maryland* Court did not decide the scope of relief available, if any, against Petitioner PUC.

Third, state immunity is implicated because any grant of the relief requested by the private parties in this case will deplete state resources, a factor not found in *Verizon Maryland*. Respondent WorldCom does not seek "money" from the PUC, but it does seek "time." The PUC resources required to satisfy the underlying complaint are not *de minimus* nor would the desired PUC action be ministerial. For example, based on a recent Pennsylvania unbundled network element rate case, it would be reasonable to budget 300 hours of time for a PUC administrative law judge with expertise in telecommunications to preside over a proceeding

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[7] 209 U.S. 123 (1908).

[8] Individual PUC commissioners have no authority to take official action on behalf of the PUC, except for certain emergency situations not applicable here. Official action of the PUC can only take place in the context of a public meeting at which a unanimous vote of the majority of sitting commissioners must act to approve such action. 65 P.S. §§ 271-286, 66 Pa.C.S. § 301(d).

to establish generic rates for unbundled network elements and to draft an initial determination on what the rates should be. The total amount of time needed would be greater.[9]

Fourth, the requested relief appears to expose the PUC to the contempt powers of the court in the event the PUC decided not to conduct further proceedings.[10] Thus, WorldCom's request for relief renders the question of the "appellate" court's jurisdiction over the PUC far from an academic question.

Petitioners have consistently maintained that the Commonwealth Court of Pennsylvania is the only legitimate appellate court of first instance in this case. Pet. at 27; Pet. App. at 62a (declining to decide whether preclusive effect should be given to Commonwealth Court decision on identical issues raised by the same parties); Pet. Supp. App. at sa-43 (noting Commonwealth Court proceeding) and sa-57-58 (declining to decide whether federal court review is exclusive).

The Third Circuit and Respondents attempt to avoid the thorny issue of state court review of state administrative agency decisions by claiming that the PUC has accepted a "grant of regulatory power offered by Congress . . . [with] conditions attached to that grant of power." Pet. at 25a. One of those conditions is waiver of immunity and another is

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[9] In addition to the assigned ALJ, other PUC employees also contribute to the effort, including, but are not limited to, employees in the Secretary's Bureau (*e.g.*, receiving, distributing, and filing documents), the Office of Special Assistants (*e.g.*, reviewing exceptions and reply exceptions filed to the ALJ's recommended decision and drafting a proposed order for the Commission's approval), and the five individual commissioners (*e.g.*, reviewing the record and staff recommendations, voting on proposed findings of fact and conclusions of law).

[10] The PUC is naturally inclined to cooperate with the Federal Government in this important matter of the development of competitive local telecommunications markets. Nevertheless, the PUC cannot be "dragooned." See *Printz v. U.S.*, 521 U.S. at 928.

prohibition of state court review. Petitioners have adamantly opposed the concept that they accepted—or even have the power to accept—such conditions. Pet. at 19-20, 27.[11]

Petitioners present a legitimate dispute on whether they have consented to waive the Commonwealth of Pennsylvania's immunity and power of state court review in order to "regulat[e] on behalf of Congress." See Pet. at 25a. Petitioners submit they have "not consent[ed] to become mere appendages of the Federal Government," *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 122 S.Ct. 1864, ____ (2002) (slip. op. at 6), when they apply the requirements of 47 U.S.C. §252 to certificated public utilities operating in Pennsylvania, including Respondent WorldCom and the other private party litigants. Moreover, Respondents have not even advanced any argument to refute the fact that Pennsylvania statutes carefully preserve immunity, not waive it. This Honorable Court should resolve the dispute in order to "accord States the dignity that is consistent with their status as sovereign entities." *Id.* at ___ (slip op. at 14).

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[11] After invoking the Commonwealth Court's jurisdiction and obtaining a judgment on federal questions, Respondent WorldCom reversed its position on the Commonwealth Court's jurisdiction in a matter now pending before the Supreme Court of Pennsylvania. *WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, No. 1 EAP 2002 (Pa.). Petitioner PUC, in its official role as respondent in WorldCom's state court action, maintains that was lawful for the Commonwealth Court to review the PUC's section 252 order (the very same order underlying the instant petition before this Honorable Court) and that any attempt to sever the PUC from the state court's oversight is unconstitutional.

## CONCLUSION

For all the reasons above, as well as the reasons set forth in the Petition, Petitioners respectfully submit that the Court should grant this petition for writs of certiorari to the United States Court of Appeals for the Third Circuit.

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